88-1362

NO. _____

Supreme Court, U.S.
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# IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

FRANK ANDREW McCALL, PETITIONER

v.

MICHAEL DUTTON and W. J. MICHAEL CODY,

RESPONDENTS

ON WRIT OF CERTIORARI

TO THE UNITED STATES

COURT OF APPEALS

FOR THE SIXTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

ON BEHALF OF FRANK ANDREW McCALL,

PETITIONER

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## QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Sixth Circuit erred in holding that there was a lack of "coercive police activity" that was a necessary predicate to the finding that Petitioner's statements taken immediately after his arrest at Frazier's Grocery were not voluntary within the meaning of the Due Process Clause of the Fourteenth Amendment.

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## REFERENCES TO OFFICIAL REPORTS

The opinions of United States Magistrate Robert P. Murrian are not reported, (included in Appendix), but were issued in Cause No. 3-86-215, on the following dates:

a. September 10, 1986

b. September 9, 1987

c. October 28, 1987

The opinion of United States District Judge James H. Jarvis issued on December 8, 1987, is not reported but bears Cause No. 3-86-215 and is included in the Appendix.

The opinion of the United States Court of Appeals for the Sixth Circuit issued and filed on December 15, 1988, is not reported as of this date but bears Cause No. 88-5223 and is included in the Appendix.

## JURISDICTION

The Petitioner seeks a review of the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit which was decided and filed on December 15, 1988.

A motion for rehearing was not filed.

This is the initial Petition for Writ of Certiorari and not a Cross-Petition for Writ of Certiorari.

The statutory provision believed by Petitioner to confer on the Supreme Court of the United States jurisdiction to review the judgment and opinion below by writ of certiorari is 28 U.S.C. Section 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

Fourteenth Amendment to the Constitution of the United States:

1. Citizenship -- Due Process of Law -- Equal Protection. -- All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

This case involves Petitioner's Petition for a federal writ of habeas corpus, 28 U.S.C. Section 2254, which was filed in the United States District Court for the Eastern District of Tennessee, Northern Division, on March 27, 1986. The matter was initially referred to the United States Magistrate, Robert P. Murrian, for a Report And Recommendation.

On August 30, 1983, in the Criminal Court for Roane County, Tennessee, Petitioner was convicted by a jury of first degree murder and possession of cocaine with intent to resell. He received a life sentence and an additional eight (8) year term of imprisonment to run consecutively with the life sentence. In the Petition, the Petitioner challenged his confinement by the State of Tennessee pursuant to these convictions and asserted six (6) grounds for relief, all of which had been previously exhausted in the Tennessee state courts and were based on alleged violations of the due process clause of the Fourteenth Amendment. The primary ground relied upon by the Petitioner is the admission into evidence of Petitioner's alleged involuntary oral statements at trial.

In a Report And Recommendation submitted on September 10, 1986, the United States Magistrate recommended that, since the Petitioner failed to receive an adequate hearing upon the voluntariness issue either at or prior to trial, the proper remedy was to remand the case to state court for the state court to afford Petitioner an evidentiary hearing on the issue of voluntariness of his oral statements or a new trial. The United States District Court, Judge James H. Jarvis, adopted the Magistrate's Report And Recommendation, and on October 15, 1986, it was ordered that the State of Tennessee hold an evidentiary hearing on the issue of voluntariness of

Petitioner's oral statements or, alternatively, grant him a new trial.

The State of Tennessee provided Petitioner with such a hearing on March 9 and 10, 1987. In an Order entered on May 5, 1987, the Criminal Court of Roane County (hereinafter referred to as "Trial Court") found Petitioner's statements to have been voluntary. That Order was filed with the United States District Court on June 16, 1987.

On September 9, 1987, the United States Magistrate issued a Memorandum wherein he found that certain of the statements of the Petitioner used against him and presented at trial were involuntary. The Magistrate reserved submitting his Report And Recommendation until the parties were afforded an opportunity to file Briefs on the issue of whether the admission of Petitioner's involuntary statements constituted harmless error beyond a reasonable doubt. Following consideration of Briefs, on October 28, 1987, the United States Magistrate presented his Report And Recommendation wherein he found that the admission into evidence of the Petitioner's involuntary statements was not harmless error in that the State of Tennessee had not demonstrated beyond a reasonable doubt that the admission of said statements did not contribute in any way to the conviction of the Petitioner. Further, the United States Magistrate recommended that the Petitioner's Petition for the writ of habeas corpus pursuant to 28 U.S.C. Section 2254 be granted, that Petitioner be afforded a new trial within a reasonable time, and failing that, that the writ issue on the challenged convictions. On November 24, 1987, the Defendants filed written objections to the Report And Recommendation of the United States Magistrate.

On December 8, 1987, the United States District Court, Judge James H. Jarvis, issued a Memorandum Opinion and an Order wherein he rejected the Report And Recommendation of the United States Magistrate and denied Petitioner's Petition for the writ of habeas corpus.

On December 18, 1987, the Petitioner filed a Motion To Alter Or Amend Judgment, To Set Aside Judgment, For A New Trial, Or For Judgment Notwithstanding The Judgment and a Brief in support thereof.

On January 14, 1988, United States District Court Judge James H. Jarvis issued an Order denying the Petitioner's Motion To Alter Or Amend Judgment, To Set Aside Judgment, For A New Trial, Or For Judgment Notwithstanding The Judgment for the reasons set forth in the Court's Memorandum Opinion of December 8, 1987.

On February 12, 1988, the Petitioner timely filed a Notice Of Appeal.

On February 23, 1988, the United States District Court entered an Order granting the Petitioner a Certificate Of Probable Cause.

The case was argued before the United States Court of Appeals for the Sixth Circuit in November, 1988, and an Opinion was filed on December 15, 1988.

On the evening in question in March, 1983, an incident had occurred on Highway 58 in Roane County, Tennessee, approximately five (5) miles south of Kingston, Tennessee, involving a Roane County Deputy Sheriff named Armes and the Petitioner. As the result of this incident, Deputy Sheriff Armes was shot and killed.

The Petitioner contended that there was another person with him who had done the actual shooting of the Deputy Sheriff. Several hours later and several miles from the shooting scene, the Petitioner was found in another county at a location called Frazier's Grocery. The mobile home of Joseph Gunter was approximately thirty (30) feet from Frazier's Grocery.

Prior to arriving at Frazier's Grocery, the Petitioner had been shot five (5) times. The first shot hit him in the groin, the second and third struck him in the chest, the fourth struck him in the left eye and head, and the fifth struck him in the side of his left leg. The Petitioner recalled that at the scene of the shooting the individual with him named Dotson was the first one to fire a pistol. After the shooting, the Petitioner recalls seeing Dotson running up the road and across into one of the fields. The Petitioner testified that after being shot he "was in a different mental state, as if in a dream." The Petitioner recalls driving the vehicle in an erratic manner and having flashes of consciousness and then passing out. After the Petitioner was shot, he was no longer able to see out of his left eye because the optic nerve had been severed.

When the officers arrived at Frazier's Grocery, they found the Petitioner lying in the doorway of the Gunter mobile home on his side on top of the glass from the broken window of the door. The Petitioner was then handcuffed with his hands in front of him, the Miranda warning was allegedly read, he was searched, and then carried out of the trailer and laid on the ground. Officer Hixon testified that he "might have asked him the same thing a couple of times." Hixon testified that the Petitioner was bleeding from the head, there was blood on his shirt, and blood on his pants. Officer Jon French acknowledged on cross-examination that he did not know whether the Petitioner knew that the people questioning

him were officers. French further testified that at Frazier's Grocery the Petitioner had blood on his face, chest area and groin area. Officer French also testified that he examined the white Toyota that was at Frazier's Grocery. He observed a large amount of blood on the driver's side in the seat, in the floor board, and on the outside of the car on the driver's side. Trooper Jesse Brooks candidly testified that the Petitioner did complain of pain at Frazier's Grocery and acknowledged that the Petitioner had been shot, but he did not know how many times. Trooper Jesse Brooks further testified that there were approximately fourteen (14) or fifteen (15) officers present while he was there at Frazier's Grocery. Trooper Brooks also acknowledged that the Petitioner was not in sufficient condition to "carry on a conversation." Trooper Brooks further acknowledged that the Petitioner was brought out of the trailer and laid on the ground in a rather rough manner and had all of these officers around him with some of the officers having their guns out and pointed at the Petitioner during questioning. He further testified that everybody was attempting to ask the Petitioner questions and the questions were not put to the Petitioner in calm tones but were "yelled at" the Petitioner. He described the Petitioner as bloody and "bleeding all over." Trooper Paul Jarnigan acknowledged that some of the officers had their guns out during the time the officers were trying to talk to the Petitioner. He further observed that the Petitioner appeared to have been shot and had blood all over his face, and from observations of the interior of the white Toyota as well as the Petitioner himself, the Petitioner had "lost a lot of blood." Trooper Paul Jarnigan further testified on cross-examination that the Petitioner "seemed to be trying to go to sleep, something to that effect, or wanting to go to sleep." Officer Bryan Farmer, who rode with the Petitioner in the ambulance to University of Tennessee Hospital, testified that he "asked him repeatedly who was with him and what had happened to the gun." He further

stated that he asked the Petitioner "approximately four (4) times" who shot Deputy Armes and "about four (4) or five (5) times" who was with him. He testified that at Frazier's Grocery there were approximately ten (10) officers around the Petitioner and admitted that some of the officers had their guns out of their holsters. Officer Farmer admitted on cross-examination that he was concerned the Petitioner was "going to die" without "getting the information" about the death of Deputy Armes. Officer Farmer further acknowledged that the Petitioner was "in bad shape; he had been shot five (5) times," and he was aware of that. He further noted that the Petitioner was still bleeding in the ambulance and complained that he was cold and his leg was hurting. TBI agent John Christopher Murphy testified concerning his examination of the white Toyota on the day following the shooting (March 16, 1983) and noted that even one day later, there was so much blood in the floorboard area of the Toyota that it was still pooled and had not coagulated.

Prior to the officers arriving at Frazier's Grocery, Mr. Joseph Gunter had contact with the Petitioner at his mobile home which was close to Frazier's Grocery. He observed that the Petitioner was all bloody and one of his eyes was "pooched out there." He further noted that the Petitioner passed out on at least two (2) occasions, and the Petitioner said: "I've been shot and robbed and all."

The Petitioner made several statements to the officers at Frazier's Grocery, some of which were conflicting. The first officer to deal directly with the Petitioner was Officer Steve Hixon who read him his Miranda rights and asked him if he understood them. The Petitioner responded, "yes". He inquired of the Petitioner where he had been shot, and the Petitioner answered, "up on another highway." He next asked the Petitioner where the gun was, and the Petitioner said, "up

on the other highway." When he asked the Petitioner what kind of gun it was, the Petitioner described it as a silver-nickel pistol. When Hixon asked the Petitioner if anyone was with him, the Petitioner answered, "Dotson." When he asked the Petitioner where Dotson was, the Petitioner responded that he was still up at the scene. Hixon next asked the Petitioner where Dotson lived, and the Petitioner said, "I think he lives in Rhea County." Officer Hixon testified further that, "he might have asked him the same thing a couple of times." On cross-examination, Officer Hixon recalled that the Petitioner later said that Dotson might live in Meigs County. Further, on cross-examination, Hixon testified that when asked about the shooting, the Petitioner said that he did not shoot Deputy Armes. The only statement that Deputy Jon French heard the Petitioner make was the word "yes" in response to Deputy Hixon's question whether the Petitioner understood his constitutional rights. Criminal investigator Sirmans testified that he heard the Petitioner say that "Dotson" was with him at the shooting scene, but "he didn't know where he went to." Sirmans also testified that the Petitioner was asked where the gun was located, and he responded that the gun "was on the ditch-bank down at where the shooting occurred," and that he "put it there." When the Petitioner was asked where Dotson lived, Sirmans testified that the Petitioner stated that he thought Dotson lived in "Rhea County." Trooper Jesse Brooks testified that the Petitioner was asked who had shot Officer Armes and that the Petitioner replied, "Steve had shot him." When asked where Steve was, the Petitioner said, "He was laying in the bushes, dead, next to the patrol car."

In the Evidentiary Hearing, certain portions of the University of Tennessee Hospital records were introduced in evidence which showed several things. The Petitioner had received multiple gunshot wounds--one gunshot wound was to the face with subsequent zygomatic

fracture and a transection or bruising of the left optic nerve. The Petitioner arrived in serious condition and was lethargic.

## ARGUMENT

**WHETHER THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRED IN HOLDING THAT THERE WAS A LACK OF "COERCIVE POLICE ACTIVITY" THAT WAS A NECESSARY PREDICATE TO THE FINDING THAT PETITIONER'S STATEMENTS TAKEN IMMEDIATELY AFTER HIS ARREST AT FRAZIER'S GROCERY WERE NOT VOLUNTARY WITHIN THE MEANING OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.**

It is the respectful position of the Petitioner that the United States Court of Appeals for the Sixth Circuit was in error in affirming the decision of the United States District Court and in rejecting the decision of United States Magistrate, Robert P. Murrian, and in holding that the statements of the Petitioner which were introduced in the Trial Court were voluntary. The United States Magistrate, Robert P. Murrian, found that the statements of the Petitioner which were made at the time of his arrest at Frazier's Grocery and thereafter, were involuntary, and they were not harmless error beyond a reasonable doubt. Further, the United States Magistrate found that the State of Tennessee at trial used the Petitioner's own statements to emphasize contradictions in the Petitioner's testimony and "strike at the foundation of the only defense he presented." Even the United States District Court found that the State of Tennessee at trial used the statements of the Petitioner to place him and his car at the scene of the crime. In holding that the

Petitioner's statements were voluntary, the United States Court of Appeals for the Sixth Circuit found that the factual findings and holding of the United States District Court demonstrated a lack of "coercive police activity" as referred to in Colorado v. Connelly, 107 S.Ct. 515 (1986). The Petitioner contends, most respectfully, that the United States Court of Appeals for the Sixth Circuit erred in holding that the factual findings by the District Court were not clearly erroneous. We feel that the United States Magistrate, Robert P. Murrian, more correctly analyzed and considered the overall evidence in this case and in essence found that the findings of the Trial Court with regard to historical facts were clearly erroneous. There were several very basic factors which the trial court, the United States District Court, and the United States Court of Appeals for the Sixth Circuit clearly overlooked. For example, a careful analysis of the entire factual picture at Frazier's Grocery points out with clarity that we had a "coercive police activity" atmosphere at the scene of Frazier's Grocery. Further, the United States Court of Appeals for the Sixth Circuit clearly failed to adequately note the testimony by even the officers present concerning the weakened state of the Petitioner. A careful examination of the testimony of many of the law enforcement officers present seems to clearly indicate that they were evasive in their testimony. However, it was Trooper Jesse Brooks who clearly testified that there were three or four weapons actually pointed at the Petitioner during the questioning. It would seem that there could be little conduct more coercive than this behavior, particularly with the Petitioner being severely injured and lying on the ground handcuffed.

In analyzing and determining the issue of voluntariness, there is a three-step process that must be followed and applied. United States Magistrate Murrian

analyzed this process very effectively at page 7 of his Memorandum dated September 9, 1987, as follows:

> The respondent is correct in stating that the United States Supreme Court has established a three-step process for resolving issues of voluntariness. The first step is finding the historical facts--the events and occurrences surrounding the confession. This step is performed by the state, and the federal court is bound by those findings unless they are wholly without support in the record. See Culombe v. Connecticut, 81 S.Ct. at 1879. The second step involves a determination of the 'psychological fact'--the defendant's mental state and how he reacted to the external facts. Id. at 1879. The third step involves the application of standards for judgment and legal concepts to the 'psychological' fact. Id. at 1879. The last two steps are, according to the U.S. Supreme Court in Culombe, 'inextricably interwoven.' The federal court is not bound by the state court's conclusions of law, thus, the last two phases of the voluntariness analysis are not conclusive on the federal court. Cf. Miller v. Fenton, 106 S.Ct. 445, 450-51 (1985), cert. denied, 107 S.Ct. 585.

It is the position of Petitioner that the United States District Court clearly erred with reference to its findings concerning the historical facts of this case and the Sixth Circuit continued this error. While considering the historical findings of the Trial Court, the United States District Court failed to adequately consider the Trial Court's total failure to consider and evaluate certain extremely material factual considerations. It is this failure by the Trial Court to even adequately consider

and evaluate certain extremely material factual events which makes the historical findings by the Trial Court without adequate support in the record. In addition, the Sixth Circuit's conclusion that the weapons being handled and pointed at the Petitioner were merely being held as a protective measure seriously begs ordinary common sense and logic in that we have the Defendant lying on the ground handcuffed with five bullet wounds. This would hardly seem to present a defendant who had any basis for fleeing or presenting a problem of danger to the officers present. Looking at this matter further, as Magistrate Murrian found:

> The Trial Court failed to make any findings, however, on the number or demeanor of the officers present; whether any or all of those officers had their pistols or rifles drawn; or whether the Petitioner was alternating from a conscious to an unconscious state prior to and/or during questioning. (R.23: Memorandum at page 9).

As Magistrate Murrian noted, the question of voluntariness must be decided on the particular facts of each case. See Culombe v. Connecticut, 367 U.S. 568, 603 (1961). Judge Murrian also quoted from Culombe, supra: "It is only by a close relevant comparison of situations that standards which are solid and effectively enforceable--not doctrinaire or abstract--can be evolved." In so doing, Judge Murrian compared the facts of the instant case with the closely parallel case of Pea v. United States, 397 F.2d 627 (D.C. Cir. 1967).

It is the further position of the Petitioner that not only did the United States District Court err with reference to its evaluation of the historical facts of the case, but it also erred in applying the second and third steps as enunciated in the Culombe case.

Before looking further at the historical facts aspect, we feel it is necessary to consider the "coercive police activity" concept as enunciated in Colorado v. Connelly, 93 L.Ed.2d 473, 482, 483 (1986).

A. THE CONNELLY CASE.

With all due respect, the District Court and the Sixth Circuit have incorrectly applied the concept of "coercive police activity" as a "necessary predicate" to the finding that a confession is not voluntary within the meaning of the due process clause of the Fourteenth Amendment as set forth in the case of Colorado v. Connelly, 93 L.Ed.2d 473, 482, 483 (1986). The principle is correctly enunciated by the Supreme Court in 93 L.Ed.2d at 482 as follows:

> Thus the cases considered by this Court over the 50 years since Brown v. Mississippi have focused upon the crucial element of police overreaching. While each confession case has turned on its own set of factors justifying the conclusion that police conduct was oppressive, all have contained a substantial element of coercive police conduct. Absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law. Respondent correctly notes that as interrogators have turned to more subtle forms of psychological persuasion, courts have found the mental condition of the defendant a more significant factor in the 'voluntariness' calculus. See Spano v. New York, 360 U.S. 315, 3 L.Ed.2d 1265, 79 S.Ct. 1202 (1959). But this fact does not justify a

> condition, by itself and apart from its relation to official coercion, should ever dispose of the inquiry into constitutional 'voluntariness'. (Emphasis added.)

The Supreme Court stated further at 483: "The difficulty with the approach of the Supreme Court of Colorado is that it fails to recognize the essential link between coercive activity of the state, on the one hand, and a resulting confession by a defendant, on the other."

With all due respect, the District Court and the Sixth Circuit have incorrectly interpreted and applied the principles in the Connelly case. The District Court and the Sixth Circuit are saying that coercion or force of an undue nature is necessary to a finding of "coercive police activity." This is not the case. As stated previously, the key issue is whether there is "police conduct causally related to the confession." In this instance, one has to carefully consider the facts and circumstances of the Connelly case. The Connelly case deals with "command hallucinations" where a person confesses to an officer in a situation where the police officer is in no way involved in obtaining the confession or statement. In the instant case, we have precisely the opposite. The officers were directly involved in trying to obtain statements from the Petitioner, Frank Andrew McCall, when he was lying injured and bullet ridden at Frazier's Grocery. The issue in the Connelly case is that the confession or statement was not causally related to police conduct. In the instant case, the officers in question were clearly, intentionally and deliberately involved in trying to obtain statements from the Petitioner. Accordingly, with all due respect, the District Court and the Sixth Circuit have incorrectly applied and interpreted the findings of the Connelly case. In this case, the Petitioner was lying on the ground next to Frazier's Grocery, was handcuffed, was bleeding extensively from five (5) bullet wounds, and, during this

period of time, numerous officers were standing around and above the Petitioner yelling questions at him with guns drawn and pointed at him. In this context, Trooper Jesse Brooks specifically testified that more than one (1) gun was drawn and pointed at the Petitioner during the questioning while the Petitioner was on the ground. If this is not coercive police activity, then nothing is. This clear statement in the record is directly contrary to the findings of the District Court and the Sixth Circuit.

## B. HISTORICAL FINDINGS

Looking at this matter further, Judge Murrian in analyzing the evidentiary hearing, pointed out certain dramatic findings of fact which were clearly omitted and overlooked in the historical findings of fact by the Trial Court. In this context, Judge Murrian stated as follows at pages 11 and 12 of the Memorandum Opinion of September 9, 1987:

> The petitioner, at the time of the initial questioning, had been shot five times. There is no dispute that he was seriously wounded. Additionally, there was considerable evidence in the record that the petitioner had lost a large amount of blood. The admitting notes of William L. Burkhart, M.D., state that the petitioner was in 'marked distress secondary to his multiple gunshot wounds'; that he was 'lethargic, but oriented and respond[ed] appropriately to pain'; that 'the left orbital area shows marked hematoma with ecchymoses, with left eye swollen shut'; and that the exam was 'consistent with either transection or bruising of the left optic nerve.' During questioning the petitioner was handcuffed and lying on the ground. There is testimony in the record that the petitioner was

> testimony in the record that the petitioner was passing out and coming to before and during the questioning. The record additionally reflects that at no point was there less than four officers on the scene, and at the time of the questioning outside Mr. Gunter's trailer there was anywhere from six to fourteen officers in the area. There is much testimony that the scene was very hectic and that the officers present were angry and yelling questions at petitioner. Additionally, testimony indicates that several officers had their guns, rifles, or shotguns drawn. There is also evidence that petitioner had ingested cocaine, a quaalude, and a beer just prior to his being shot.

There are certain additional significant factual elements concerning the issue of voluntariness which were totally overlooked in the Trial Court's findings of fact. These are as follows:

1. The fact that the Petitioner, Frank Andrew McCall, had already begun passing out while he was still with Joseph Gunter before the law enforcement officers arrived. Trooper Brooks observed Petitioner pass out and come to three to four times during questioning.

2. The Petitioner was unable to even relate coherently certain telephone numbers to Mr. Gunter while in his mobile home prior to the law enforcement officers' arrival.

3. That the State of Tennessee failed to adequately prove that Officer Steven Hixon properly advised the Petitioner of his Miranda rights. In this context, Officer Hixon said he read from a card but did not really know what was on the card nor did he know

rights. Further, the other officers who arrived could not properly identify what Officer Hixon advised the Petitioner with reference to his rights. Further, the other officers who arrived could not properly identify what Officer Hixon advised the Petitioner with reference to his rights; and Trooper Jarnigan testified that the Miranda warning was not complete.

4. That the Petitioner was bleeding extensively and profusely throughout the period of time at Frazier's Grocery (Joseph Gunter mobile home) and was still bleeding thereafter on the trip to the University of Tennessee Hospital in the ambulance. A large pool of blood was in the Toyota automobile on the floor of the driver's side.

5. That the Petitioner had been shot five (5) times with the gunshot wound to the head and face transecting or bruising the left optic nerve. Said hospital record also sets forth that the Petitioner arrived at the hospital in serious condition, that he was uncooperative on examination, was moaning and was lethargic, a key element in Pea v. United States, supra, where the court found that the defendant in that case was lethargic, a state where the person does not care about anything. In such a lethargic state, the Petitioner could answer yes or no to any question but was indifferent to protect himself or not to protect himself. This is a key element to the requirement of a showing that the Petitioner exercised a rational intellect and a free will. This is totally different from a simple cognitive understanding of a small fact or concept.

6. That during the questioning of the Petitioner at the Joseph Gunter mobile home next to Frazier's Grocery, the Petitioner was handcuffed, lying on the ground, had five (5) bullet wounds, was bleeding extensively and, during the questioning, numerous

officers were standing around and above the Petitioner yelling questions at him and had guns pointed at him.

A careful reading of the transcript indicates that many of the officers who testified were extremely evasive about matters concerning what happened during the questioning of the Petitioner at Frazier's Grocery. Nevertheless, it appears clear from a careful analysis of this testimony with particular reference to Trooper Jesse Brooks and the other officers that while they were questioning the Petitioner when he was handcuffed on the ground, the officers were extremely angry toward the Petitioner, were yelling questions at him and, at least some of the officers, had guns pointed at the Petitioner during the questioning. Further, as noted from the testimony of Troopers Paul Jarnigan and Jesse Brooks, the Petitioner was passing out and coming to, and Trooper Brooks testified this occurred at least three (3) to four (4) times while the Petitioner was on the ground. Coupled with these factors is the evidence from numerous witnesses that the Petitioner was giving inconsistent and contradictory answers with reference to the name of the person who was with him, the place where this person lived and the place where the gun was left.

The Connelly case did not change the basic law in the United States with regard to the issue of voluntariness. It merely explained it further with reference to the causal relation of police conduct to the confession or statement. This historical development by the Supreme Court and other federal courts in this area is still extremely cogent and relevant.

The fairly recent case of Mincey v. Arizona, 437 U.S. 385 (1978) is extremely close to the case of Frank McCall. That case involved a defendant who was seriously shot in a narcotics raid upon the apartment

where he resided. In the incident, the defendant shot and killed an officer. After the shooting, defendant was taken to the hospital where it was found that he had sustained a wound in the hip, resulting in damage to the sciatic nerve and partial paralysis of his right leg. While in the intensive care unit, a detective came to interrogate him. Defendant was unable to talk because of a tube in his mouth, and he thus responded to the detective's questions by writing answers on pieces of paper. The detective gave the requisite Miranda warnings prior to questioning. A pretrial hearing as to voluntariness was held as required by Jackson v. Denno, 378 U.S. 368 (1964). The Trial Court found defendant's statements were voluntary.

In finding the statements involuntary, Justice Stewart held as follows:

> It is hard to imagine a situation less conducive to the exercise of "a rational intellect and a free will" than Mincey's. He had been seriously wounded just a few hours earlier, and had arrived at the hospital "depressed almost to the point of coma," according to his attending physician. . . . He was evidently confused and unable to think clearly about either the events of that afternoon or the circumstances of his interrogation since some of his written answers were on their face not entirely coherent. . .... . He was, in short, "at the complete mercy" of Detective Hurst, unable to escape or resist the thrust of Hurst's interrogation.

Id. at 398-99 (citations omitted). As noted in the Mincey case, the factors making the statements not "the product of a rational intellect and a free will" do not require

actual force or coercion by the law officers. Such can be based on the debilitated and helpless condition of the person making the statements.

A further very important case which is precisely analogous to the case of Frank McCall must be presented. In Pea v. United States, 397 F.2d 627 (D.C. Cir. 1967), Judge Leventhal was concerned with the issue of voluntariness of statements made by the defendant to a police detective in a hospital emergency room after having a gunshot wound to his head. In discussing and analyzing this issue, the Court stated:

> Coppage went to the table on which the defendant was lying and observed he had a gauze covering on the upper part of his head as well as one eye.
>
> Standing two feet from defendant's face, Coppage conversed with him after first advising that he was a police officer. From this conversation he learned that defendant resided on K Street. Defendant informed Detective Coppage that he had shot his wife and thereafter shot himself. . . .
>
> Detective Coppage's entire conversation with the defendant lasted no more than five minutes, during which Coppage asked only several questions requiring a yes or no answer. The rest of the conversation was stated in narrative form by the defendant. . . .
>
> Throughout the conversation the defendant appeared to Coppage as being coherent and he had no trouble talking. . . .

The Sibley Memorial Hospital record shows that on June 28, 1960 at 10:50 P.M., a physical examination of the defendant revealed presence of a gun shot wound in the right temple. That record states that the defendant was conscious, ambulatory, and coherent. The right eye was devoid of vision, was swollen, tender and painful. . . .

. . . the defendant was conscious, could answer questions yes or no, but he could not talk fluently. Dr. Mena also testified that the x-ray revealed a bullet in the right temporal area and that it destroyed the right optic nerve. While the Defendant had suffered a concussion, no damage was done to the defendant's brain by the gunshot wound. . . . Dr. Mena also testified that as a result of intoxication and concussion, the defendant was in a state of lethargy, but that he could answer yes or no to any questions put to him. Dr. Mena expressed the opinion that defendant would be indifferent as to protecting himself with respect to any question.

. . .

We also accept what is implicit in the findings of the District Judge that at the time of his confession petitioner had cognitive understanding of what he had done, and that there are no indicia that his confession was not a reliable and trustworthy account of what happened.

More is required, however, to show that a confession is voluntary. It must be shown

that in fact the confessor had a free will and intellect whether or not the detective had any reason to doubt its presence or suspect its absence.

. . .

Petitioner was not under the influence of a truth drug. But his condition was its equivalent, so far as effect on free will is concerned, according to a description of petitioner's condition contained in the testimony on deposition of Dr. Mena, the chief resident in neurosurgery at D. C. General Hospital who examined petitioner shortly after the confession. . . .

. . .

. . . the x-ray showed that the bullet had destroyed the right optic nerve, and become implanted in the middle of the skull. There was no brain damage but small pieces of bone and bullet were sprayed over the sinuses. He "definitely" had a concussion from the impact of the bullet, which means, as Dr. Mena testified--

> that the person at that moment and even the next day cannot be normal, in a normal condition. That means that we call this syndrome of concussion, that is, little confused and lethargic. . . .
>
> . . . so he was in a state of lethargy, lethargic; so it is a state that he doesn't care anything. He can

> answer yes or no to any question that somebody asks * * * he was indifferent to protect himself or not to protect himself.
>
> . . .
>
> . . . and we think it manifest that his free will is likewise negatived if his statement reflects the concussion of a bullet shattering in his head, leaving him with the external appearance of coherence, but devoid of his normal will to protect himself and rendered indifferent to protect himself.
>
> . . .
>
> . . . [I]n the exercise of our supervisory power over the administration of federal criminal justice in the District of Columbia, [we] adopt the rule that a judicial determination that a confession is admissible cannot be made unless the judge is satisfied beyond a reasonable doubt that the confession was voluntary.

Id. at 629-37 (citations omitted) (footnotes omitted).

In analyzing the historical findings of the case at bar, the District Court concluded as follows:

> Specifically with respect to "coercive police activity," see Connelly, 107 S.Ct. at 522, the evidence of overreaching on the part of the police appears to be that there were many officers present, that some were angry and yelling questions at petitioner, and that several officers had rifles or handguns drawn.

> There was conflicting evidence on the question of whether questions were "yelled" at petitioner. (Compare Tr. 70, 114, 311-12 with Tr. 81, 158). Testimony and photographs indicated that several officers were carrying rifles or carbines at the time of the interrogation. Testimony was conflicting but also indicated that some officers had drawn pistols at least at some point. However, there is no clear evidence in the record that any of these weapons were ever pointed at the petitioner. Certainly there was no evidence that the officers used these weapons in any way to force a "confession" out of the petitioner.

We respectfully submit that the foregoing conclusions of the District Court and supported by the Sixth Circuit are unsound and in error. In this context, we refer the Court to the testimony of Tennessee Highway Patrolman Jesse Brooks who testified in the Evidentiary Hearing in March, 1987, that several law enforcement officers during the questioning had their pistols out of their holsters pointed at the petitioner during the questioning. Further, he testified that during the questioning there were approximately fourteen to fifteen officers around the petitioner, the situation was not a calm one, and that officers were not asking questions in calm tones. In fact, Trooper Brooks testified that the officers around the Petitioner were actually yelling questions at the Petitioner. It would seem to stretch the imagination to say that the foregoing factual circumstances were not extremely coercive toward the Petitioner.

Conversely, we feel that Judge Murrian correctly analyzed the historical findings and the factual circumstances in concluding that the statements made by

the Petitioner were involuntary. Said conclusions are as follows:

> The undersigned is of the opinion that the totality of the aforementioned circumstances led the petitioner to make statements involuntarily. It is hard to imagine a situation less conducive to the giving of a statement which is the "product of a rational intellect and a free will." The petitioner's physical condition (loss of blood due to five gunshot wounds with a serious wound to the head producing blindness in the left eye), his state of lethargy, and his physical surroundings (6-14 angry officers, some with guns, rifles or shotguns drawn) diminished the petitioner's ability to act of his own free will and "sapped his powers of resistance and self-control." See Culombe v. Connecticut, 81 S.Ct. at 1878-79. The petitioner's actions earlier in the evening which indicated that petitioner was attempting to protect himself are not a true indication of his physical and mental state at the time he was questioned. The petitioner continued to lose blood to the point that Mr. Gunter was afraid he might bleed to death (Tr. 218; 226), and had fallen to the ground at least twice while at Mr. Gunter's residence (Tr. 216-217). The fact that petitioner fell to the ground twice while at Mr. Gunter's mobile home and a final and third time by the time officers arrived on the scene indicates petitioner's weakened and deteriorating physical condition. Additionally, it is not enough that the petitioner may have had a cognitive understanding of what he had done or that his confession was reliable and trustworthy. It

must be shown that his will was not overborne. See Pea v. U.S., 397 F.2d at 632.

> The undersigned does not believe that the state proved by a preponderance of the evidence that petitioner's statements were made with the free will and intellect requisite under constitutional standards. Therefore, for the foregoing reasons, the statements made by the petitioner at the scene of his arrest and/or during transit to the hospital are found to have been made involuntarily. (R.23: Memorandum at page 12, 13).

We thus feel that the more appropriate conclusion in this case is that there was "coercive police activity" and considering the totality of the facts and circumstances, the statements made by the Petitioner must be considered involuntary.

## CONCLUSION

In conclusion, the Petitioner respectfully submits that the District Court and the Sixth Circuit were in error in their decisions that the statements of the Petitioner were voluntary. We feel very strongly that the more correct decision as determined by United States Magistrate Murrian is that the statements made by the Petitioner were involuntary. Accordingly, the Petitioner respectfully prays that the decisions of the District Court and Sixth Circuit be reversed and that this cause be remanded for a new trial or, failing that within a reasonable time, that the writ of habeas corpus with reference to said convictions issue.

This 13th day of February, 1989.

Respectfully submitted,

W. P. Boone Dougherty
Attorney for Petitioner

OF COUNSEL:

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## CERTIFICATE OF SERVICE

I hereby certify that the requisite number of true and correct copies of the foregoing Brief were served by United States Mail, postage prepaid, upon Betty Springfield-Carter, Assistant State Attorney General, 450 James Robertson Parkway, Nashville, Tennessee 37219.

This 13th day of February, 1989.

W. P. Boone Dougherty
W.P. Boone Dougherty

## AFFIDAVIT OF TIMELY FILING

STATE OF TENNESSEE )
)
COUNTY OF KNOX )

W. P. BOONE DOUGHERTY, being duly sworn, deposes and says:

1. That he is an attorney licensed to practice law in the State of Tennessee, and is also a member of the bar of the Supreme Court of the United States, having been so admitted in 1966.

2. That on the date of February 13, 1989, within the time specified for filing, he deposited the requisite number of copies as required by Supreme Court rules in the United States mail, with sufficient postage, addressed to the proper address of the clerk of the United States Supreme Court.

This 13th day of February, 1989.

W. P. Boone Dougherty
W. P. BOONE DOUGHERTY

Sworn to and subscribed before me this 13th day of February, 1989.

My Commission Expires:

2/28/89 Judy D. Tyre
NOTARY PUBLIC

# APPENDIX

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*Recommended for Full Text Publication*
*See, Sixth Circuit Rule 24*

No. 88-5223

**UNITED STATES COURT OF APPEALS**
For the Sixth Circuit

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Frank Andrew McCall,
*Petitioner-Appellant,*

v.

Michael Dutton and W.J. Michael Cody,
*Respondents-Appellees.*

On Appeal from the United States District Court for Eastern District of Tennessee.

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Decided and Filed December 15, 1988

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Before: **KRUPANSKY** and **GUY**, Circuit Judges; and **MEREDITH**, District Judge.*

---

*The Honorable Ronald E. Meredith, United States District Court for the Western District of Kentucky, sitting by designation.

Andrew McCall (McCall) for a federal writ of habeas corpus under 28 U.S.C. § 2254. McCall timely appealed the decision of the district court. McCall was convicted of first degree murder and possession of cocaine with intent to re-sell by a jury in the criminal court for Roane County, Tennessee. McCall received a life sentence with an additional 8-year sentence to run consecutively, subsequent to a trial on the murder and cocaine charges that commenced on August 30, 1983.

McCall charged upon appeal to the state appellate court that the trial court erred in admitting into evidence the statements he made to officers at the scene of his arrest and at the hospital subsequent to being placed into custody. The state appellate court initially decided that the issue was waived because of appellant's failure to provide a complete record of the hearing addressing his motions to suppress conducted before the trial court. However, the appellate court, upon reconsideration, permitted the record to be supplemented, and ruled on the merits of appellant's motion. After the record had been supplemented, the state appellate court affirmed the lower court's refusal to suppress the controversial statements. Appellant then filed for permission to appeal to the Tennessee Supreme Court. That petition was denied on September 30, 1985.

The instant petition for a writ of habeas corpus was filed in federal court on March 27, 1986. On October 15, 1986, the district court adopted the report of the magistrate to whom the case had been referred and ordered the state to afford the petitioner an evidentiary hearing on the issue of the voluntariness of his oral statements, or a new trial, because it concluded that the suppression hearing that had been conducted at the state trial level had not satisfied constitutional standards.

On March 9-10, 1987, the Tennessee court system afforded appellant a new hearing. In an order entered on May 5, 1987, the criminal court of Roane County concluded that appellant's statements were voluntary.

On July 10, 1987, the petitioner filed a brief and memorandum in the federal district court and again requested that the petition for habeas corpus be granted, contending, *inter alia*, that, despite the state court's rulings, the oral statements were involuntary and should have been suppressed. On September 9, 1987, the magistrate found that a number of the statements used against petitioner at trial had been involuntary. The magistrate requested additional briefs to determine the prejudicial effect, if any, of the statements that he had characterized as involuntary. On October 28, 1987, the magistrate presented his report and recommendation wherein he determined that the admission of the involuntary statements constituted clear error and recommended that the petition for the writ of habeas corpus be granted.

After hearing the objections of the State of Tennessee to the magistrate's report, the district court, on December 8, 1987, issued a memorandum opinion and order which rejected the magistrate's report. The district court denied McCall's habeas corpus petition, subsequent to which McCall filed this timely instant appeal.

Petitioner, a 35-year old male, had received a degree in education from the University of Tennessee. He had taught school for a year and attended graduate school, seeking a degree in psychology. On March 15, 1983, McCall was involved in a confrontation with Roane County Deputy Sheriff Dennis Armes (Armes). As a result of the confrontation, Armes was shot and killed. During the encounter, Armes fired five shots from his

weapon, striking McCall in the left lung, groin, chest, and on the side of the head. Several hours later the appellant was apprehended in another county at a location called Frazier's Grocery.

Before arriving at Frazier's Grocery, McCall had driven his automobile to the store/residence of Sarah Carter in Meigs County, Tennessee several miles from the scene of the shooting. McCall had "blood all over his face and head," according to Carter. He demanded that he be admitted into her house, which Carter refused. After she refused, McCall drove several miles on a winding road, without incident, to the house of 76-year old Joseph Gunter in McMinn County, Tennessee. Gunter assisted McCall into his (Gunter's) house and permitted McCall to make several phone calls. However, when McCall was unable to establish telephone contact with the individuals that he phoned, he used a pair of scissors and proceeded to threaten Gunter "to drive me to Etowah or I'm going to stab you in the stomach with these scissors." Gunter attempted to retrieve the scissors from McCall who rebuffed the effort, whereupon Gunter, at gunpoint, forced McCall to drop the scissors. McCall then fell to the floor, apparently unconscious.

Gunter left the scene to summon assistance from a nearby resident. Receiving no response from his neighbor, he returned to his mobile home and found McCall on the ground outside Gunter's mobile home. Gunter returned to the mobile home and dialed the police telephone number. As Gunter was dialing, McCall burst into the mobile home and forcibly took the phone from Gunter and terminated the call. At that point, Gunter's son (Harold Gunter) arrived. At McCall's request, Harold Gunter called a woman in Etowah, Tennessee who requested Gunter to determine the name and identify of the individual who requested him (Gunter) to place the call. For the first time, McCall

disclosed his name and conversed with the recipient of the call in a rough manner. The phone thereupon went dead. McCall remained on the floor of the mobile home, where he had fallen, until police assistance arrived.

Officers Steve Hixon (Hixon), Jon French (French), Jesse Brooks (Brooks), Paul Jarnigan (Jarnigan), David Haggard (Haggard), Darrell Sirmans (Sirmans), Bryan Farmer (Farmer), and Sheriff R. L. McKenzie (McKenzie), arrived at the scene shortly after the Gunters requested police assistance. Several of these officers removed McCall from the mobile home and placed him on the ground in front of Frazier's Grocery, which was adjacent to the mobile home. He was searched and handcuffed. During this time, McCall was complaining of pain. Four or five officers who circled McCall interrogated him. A number of the officers had their guns drawn. Officer Brooks testified that it was standard procedure to have guns unholstered and pointed at a dangerous felony suspect, especially under the circumstances in the instant case. However, Officer Sirmans testified that, although revolvers were unholstered, they were not pointed directly at McCall. Similarly, Officer Farmer testified that revolvers, although unholstered, were not pointed directly at McCall.

Before any interrogation had been undertaken, Officer Hixon advised McCall of his *Miranda* rights. When queried if he understood those rights, McCall replied, "yes."

Brooks testified that McCall "passed out and came to" three or four times, but may have been closing his eyes to avoid conversation. Similarly, Officer Jarnigan described McCall as "trying to go to sleep" and "closing his eyes." However, Officer French testified that "he [McCall] was coherent." In the suppression hearing,

Officer Farmer testified that defendant was conscious, answering questions, and his eyes were open. Farmer described defendant as "conscious at all times, it appeared."

The circumstances surrounding the confession notwithstanding, it is uncontroverted that McCall consistently and emphatically stated, in response to police interrogation, that a man named Dotson had shot the police officer. McCall refused to admit that he had shot Armes. He (McCall) stated that there was a gun in a ditch near the shooting scene. Subsequent to describing the gun as a silver-nickel pistol, McCall also claimed that the money that had been found on his person was his own and not stolen.

Within fifteen minutes after the arrival of the law enforcement authorities, an ambulance arrived at Frazier's Grocery and conveyed McCall to Sweetwater Hospital. Officer Farmer accompanied McCall on the trip. Farmer continued to question McCall concerning the identity of the individuals who had accompanied him and the whereabouts of the gun that had been used at the shootout. McCall persisted in denying the actual shooting of Officer Armes, stating that Dotson had shot Armes and that the gun had been thrown into an embankment at the shooting scene. Farmer further testified that at the hospital McCall changed his story by stating that he had thrown the gun from the vehicle along the highway while fleeing the scene of the shootout.

McCall's hospital records disclosed that he was lethargic and his condition was described as "serious" upon arrival. Additionally, it was discovered that McCall had ingested cocaine, a "quaalude," and a beer at some point prior to the time of his admission.

Several days after McCall had been admitted to Sweetwater Hospital, he was transferred to the University of Tennessee Medical Center. At the University Hospital, McCall made oral statements to Officer Hixon that tracked those he had made earlier at Frazier's Grocery and during the trip to Sweetwater Hospital. However, the district court concluded that Officer Hixon had neglected to administer a valid *Miranda* warning prior to the University Hospital interrogation. The district court determined that the admission of the statements given at University Hospital constituted harmless error. On appeal, neither the state nor McCall challenged the district court's decision concerning those statements.

The federal district court ordered a new hearing before the state court at the conclusion of the first federal habeas corpus proceeding on October 15, 1986, the State of Tennessee proceeded to conduct the required evidentiary hearing, and arrived at the following decision:

> From all of the testimony in the record of the case, this court finds that Frank McCall was wounded in the leg, groin, chest and head, but that it is apparent he knew his circumstances and was capable of exercising a rational intellect and a free will. Mr. McCall drove his automobile several miles on a two lane, curvy, rural road thereby placing distance between himself and the scene of the shooting. He did not collide with any other motorist nor any roadside fence, ditch, utility pole, etc. He left the home of Sarah Carter when she would not let him in, but had announced she would call help for him. It is clear that his purpose was to get help from friends in Etowah and avoid police contact. Mr. McCall drove several

> more miles to Mr. Gunter's residence in an adjoining county and his conduct with Mr. Gunter causes this Court to conclude that he was exercising his rational intellect and his free will. His cognitive abilities were still not significantly impaired. He was not abused by authorities who read his Miranda Warnings from a card and to which Mr. McCall said he understood. The Court finds no police overreaching under the circumstances of this case. Frank McCall is a well educated man with a history of being an athlete, who apparently comes from a middle-class family background.

The federal district court in the instant case made specific findings with regard to the conduct of the police officers and agreed with the state court that petitioner's confessions were voluntary. The principal district court findings included the following:

> The evidence showed that Officer Hixon read petitioner his "Miranda" rights immediately upon arriving at the scene. The evidence supports a finding that although petitioner was seriously injured he was conscious and alert during the time that he was being interrogated.... The petitioner was able to flee the scene of the shooting in his car, stop to call for help on two occasions, make a phone call and threaten an elderly man with a pair of scissors.
>
> It is true that petitioner fell many times while he was fleeing. However, this does not mean that he was unconscious each time that he fell. The court notes that petitioner had a serious leg injury at the time.

* * *

Specifically with respect to "coercive police activity," *see Connelly*, 107 S.Ct. at 522, the evidence of overreaching on the part of the police appears to be that there were many officers present, that some were angry and yelling questions at petitioner, and that several officers had rifles or handguns drawn. There was conflicting evidence on the question of whether questions were "yelled" at petitioner.... Testimony and photographs indicated that several officers were carrying rifles or carbines at the time of the interrogation. Testimony was conflicting but also indicated that some officers had drawn pistols at least at some point. However, there is no clear evidence in the record that any of these weapons were ever pointed at the petitioner. Certainly there was no evidence that the officers used these weapons in any way to force a "confession" out of the petitioner.

Upon this court's review of the evidence, it is clear that petitioner was in an injured and weakened state at the time of his arrest and interrogation. However, this court cannot find the "coercive police activity" that is a "necessary predicate" to a finding that petitioner's statements taken immediately after his arrest were not voluntary within the meaning of the due process clause.

This court must presume that state court subsidiary findings of historical fact are correct. *See* 28 U.S.C. § 2254(d). *See also Cooper v. Scroggy*, 845 F.2d 1385,

1392 (6th Cir. 1988). Moreover, the district court's findings of fact in habeas cases are subject to the clearly erroneous standard of review. *See Blackburn v. Foltz*, 828 F.2d 1177, 1181 (6th Cir. 1987); *Ray v. Rose*, 535 F.2d 966, 973 n.9 (6th Cir. 1976). Deference to lower court's findings is especially warranted in cases where the critical evidence is testimonial. *United States v. Wolf*, 813 F.2d 970, 975 (9th Cir. 1987).

The test for voluntariness of a confession involves three factors. Threshold to the determination that a confession was "involuntary" for due process purposes is the requirement that the police "extorted [the confession] from the accused by means of coercive activity." *See United States v. Rohrbach*, 813 F.2d 142, 144 (8th Cir. 1987)(citing *Colorado v. Connelly*, 107 S.Ct. 515, 522 (1986)). Once it is established that the police activity was objectively coercive, it is necessary to examine petitioner's subjective state of mind to determine whether the "coercion" in question was sufficient to overbear the will of the accused. *Rohrbach*, 813 F.2d at 144. Finally, petitioner must prove that his will was overborne *because* of the coercive police activity in question. If the police misconduct at issue was not the "crucial motivating factor" behind petitioner's decision to confess, the confession may not be suppressed. *See Connelly*, 107 S.Ct. at 520; *Green v. Scully*, 850 F.2d 894, 903-04 (2d Cir. 1988)(where defendant confessed because he was afraid he would harm others and not because of police misconduct, confession not suppressed); *Hawkins v. Lynaugh*, 844 F.2d 1132, 1140 (5th Cir. 1988)(despite length of police interrogation, petitioner confessed because he decided to "get it over with" rather than as a result of coercion; accordingly confession ruled "voluntary"); *Rohrbach*, 813 F.2d at 145 n.1 (denying petition for habeas corpus because petitioner did not

show any "causal nexus" between alleged police misconduct and confession).

In the case at bar, the district court based its decision solely on the first prong of this three-part test. The court acknowledged that petitioner was in an "injured and weakened state at the time of his arrest and interrogation." However, the Court decided that consideration of defendant's mental state was unnecessary because McCall failed to surmount the preliminary hurdle of showing "coercive police activity."

Mindful of the foregoing standards of review, this court cannot conclude that the district court's factual findings were clearly erroneous. Accordingly, this court agrees that there was no "coercive police activity" in this case. Moreover, this court would affirm on either of the two remaining prongs of the three-part test. In the case at bar, the petitioner's mental state was not so weak that it was overborne by the asserted "coercion." Nor did defendant establish the requisite causation between the police conduct and petitioner's confession.

Petitioner charged that the police conduct was coercive because he had been handcuffed, placed on the ground, and surrounded by numerous police officers who "yelled" and pointed weapons at him.

However, the district court correctly found that there was "no evidence that the officers used these weapons in any way to force a 'confession' out of the petitioner." Indeed, with the exception of Officer Brooks, no other police officer testified that any guns were leveled directly at petitioner. Moreover, petitioner failed to introduce evidence to support his assertion that any activity that occurred at the time of his apprehension and immediately thereafter intimidated him in any way or coerced him to make the controversial statements.

At any rate, it was uncontroverted that the display of weapons was not intended to "extort" a confession by coercive means. *See Rohrbach*, 813 F.2d at 145 (statement cannot be involuntary unless extorted from accused by coercive means). Instead, as Officer Brooks testified, the weapons were carried as a "protective measure" employed against a dangerous fleeing felon who had recently killed a fellow police officer. Because petitioner offered no evidence to prove that this explanation was pretextual, this Court concludes that the display of weapons was not unwarranted and did not constitute police overreaching. Accordingly, in the absence of proof of improper police behavior, the mere display of weapons does not justify suppression of petitioner's statements. *Cf. Cooper v. Scroggy*, 845 F.2d 1385, 1392 (6th Cir. 1988)(deterrence of police overreaching is a major purpose underlying the exclusion of involuntary confessions).

Nor did plaintiff demonstrate that the confusion and shouting that prevailed at the scene at Frazier's Grocery was coercive. Moreover, it is well-recognized that "mere emotionalism and confusion" at Frazier's Grocery did not by itself constitute police coercion. *See Hawkins v. Lynaugh*, 844 F.2d at 1140 ("[n]either mere 'emotionalism and confusion,' nor mere 'trickery' will alone necessarily invalidate a confession")(citing *Corn v. Zant*, 708 F.2d 549, 567 (11th Cir. 1983), *cert. denied*, 467 U.S. 122 (1984)).

McCall also contended that he had received no *Miranda* warnings. He correctly stated that the "absence of *Miranda* warnings is one factor to be considered in assessing the voluntariness of a confession." *United States v. Pelton*, 835 F.2d 1067, 1072 (4th Cir. 1987)(citing *Davis v. North Carolina*, 384 U.S. 737 (1966)). However, in the case at bar, Officer French explicitly testified that McCall had been

read his rights and had responded "yes" when requested to acknowledge his understanding of his rights. This court is constrained to uphold the district court and state court decisions to credit French's testimony and this court must conclude that McCall was properly read his *Miranda* rights.

In short, after a review of the applicable sections of the transcript, this court concurs with the district court's finding that no "police coercion" occurred. This finding alone should end the inquiry because proof of police coercion is a threshold requirement for petitioner's claim.

This court also notes, however, that even if petitioner had proved police coercion, he would still not prevail because the alleged "coercion" was simply insufficient to overbear the will of the accused. It is uncontroverted that McCall was a college graduate with some graduate school experience. *See Pelton*, 835 F.2d at 1073 (finding that petitioner was an educated man tends to support a finding that petitioner's will was not overborne). It is also undisputed that shortly before the instant interrogation, McCall had demonstrated his mental acuity by driving a number of miles on a winding road, by threatening both Sarah Carter and Joseph Gunter, and by placing several coherent telephone calls for assistance. Additionally, McCall affirmatively responded that he understood his *Miranda* rights. Officer French testified that McCall "seemed to be coherent," and Officer Farmer claimed that McCall was "conscious, answering questions, and his eyes were open." *See Rohrbach*, 813 F.2d at 145 (rejecting claim of involuntary confession where, *inter alia*, federal agents testified that petitioner was "lucid and able to communicate" at the time of the interrogation). Finally, it is noteworthy that McCall's denials were consistently exculpatory and he persistently identified "Dotson" as the

individual who shot and killed Officer Armes. *Cf. Pelton*, 835 F.2d at 1073 (where, *inter alia*, defendant "refused to give certain information" because he believed that information could harm him, defendant's statements not involuntary).

In view of the totality of the circumstances, this court cannot support a conclusion that McCall's mental state was so weakened that his will was overborne. On the contrary, McCall was "coherent," capable of threatening innocent bystanders, and able to understand the consequences of his statements. Even if the police activity was "coercive," petitioner's mental state was strong enough to withstand the alleged coercion.

In the view of this court, McCall also failed to prove the third necessary element to support his claim, namely that the alleged police coercion was causally connected to the confession. *See Connelly*, 107 S.Ct. at 521. This court is not authorized to conduct "sweeping inquiries into the state of mind of a criminal defendant who has confessed, inquiries quite divorced from any coercion brought to bear on the defendant by the state." *Id.*

In the instant case, McCall did not testify that he confessed *because* of the coercive conduct of the police. Indeed, McCall testified that he did not remember the questions. He testified that he "blanked out" a number of times, and did not have clear recollections of the confession scene. Accordingly, if McCall's confession was a product of his own incoherent state of mind, rather than a product of police coercion, the confession should not be suppressed. *See Green v. Scully*, 850 F.2d at 903-04. (Confession not suppressed because police misconduct was not "crucial motivating factor" behind confession; defendant confessed because he was afraid he would harm others, not because of police misconduct).

*See also Rohrbach*, 813 F.2d at 145 n.1 (establishing "causal nexus" requirement).

Accordingly, petitioner has failed to satisfy the standards articulated by existing legal precedent necessary to support his petition for habeas corpus relief. The decision below is AFFIRMED.[1]

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[1]Affirmance might have been possible on a harmless error rationale. Petitioner's statements, like those in *Dugger*, 838 F.2d at 1546, "did not really constitute a confession" and might have been harmless. *Id. However, this court need not reach this issue which was not briefed by the parties.*

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

| | | |
|---|---|---|
| FRANK ANDREW McCALL, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| v. | ) | Civ. No. 3-86-215 |
| | ) | |
| MICHAEL DUTTON, et al., | ) | |
| | ) | |
| Defendants. | | |

REPORT AND RECOMMENDATION

This matter was referred to the undersigned United States Magistrate pursuant to a standing order of this Court, 28 U.S.C. § 636(b) and Rules 1 and 10, Rules Governing § 2254 Cases in the United States Courts, for a report and recommendation regarding disposition by the District Court of the petition for a federal writ of habeas corpus, filed by Frank Andrew McCall. The petitioner challenges his confinement by the State of Tennessee under a judgment entered on August 30, 1983, in the Criminal Court of Roane County, Tennessee. Petitioner was convicted by a jury of first degree murder, and possession of cocaine with intent to resell. His punishment on the murder conviction was fixed at life imprisonment in the state penitentiary. He was fined $15,000.00 and sentenced to an additional eight years imprisonment to run consecutively to the life sentence on the drug conviction.

The petitioner appealed his convictions to the Tennessee Court of Criminal Appeals which overruled all of his assignments of error and affirmed his conviction in an opinion filed February 1, 1985. On a petition to rehear, that Court extensively considered and overruled petitioner's Fourth Amendment claims relating to the research of his vehicle. The petitioner thereafter filed an application for permission to appeal to the Tennessee Supreme Court which was denied in an order dated September 30, 1985.

The instant petition presents six due process based grounds for relief, all of which have been exhausted in state court: (1) Impermissible voir dire of prospective jurors resulting in a "death qualified" jury; (2) failure to grant a change of venue after extensive pretrial publicity; (3) admission into evidence of petitioner's oral statements which were involuntary; (4) admission into evidence of testimony of Trooper Brooks concerning statements made by petitioner which were not disclosed in requested discovery; (5) admission into evidence of photographs of the deceased; and (6) admission into evidence of results of atomic absorption tests. The petitioner also asserts that the warrantless search of his vehicle violated his Fourth Amendment rights.

Introduction of Petitioner's Oral Statements

Petitioner contends that the trial court erred in admitting into evidence the statements which he made to officers at the scene of his arrest and at the hospital. Although not confessions, the petitioner has characterized the statements as admissions against interest and materially adverse to his position. The petitioner, who was severely wounded at the time of this questioning, contends that the atmosphere of the questioning was coercive and that because of his

weakened physical and mental condition the statements were not voluntarily given.[1]

The respondent argues that the finding by the Tennessee Court of Criminal Appeals that there was "no instance that the defendant's statements were involuntary or taken in violation of his constitutional rights under the Fifth or Fourteenth Amendments," is a factual determination entitled to the presumption of correctness under 28 U.S.C. § 2254(d). The undersigned disagrees. In Miller v. Fenton, 476 U.S. ___, 106 S.Ct. 445, _____ L.Ed.2d _____ (1986), the Supreme Court unambiguously held "that the ultimate issue of 'involuntariness' is a legal question requiring independent federal determination . . . [and this] 'duty to make an independent evaluation of the record' . . . applies . . . [whether] the claim is that the police conduct was 'inherently coercive' . . . [or that] the interrogation techniques were improper only because, in the particular circumstance of the case, the confession is unlikely to have been the product of a free and rational will. . . .

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[1]While the Tennessee Appellate Court initially stated that this issue must be considered waived by virtue of appellant's failure to provide a complete record of the hearing [on the motions to suppress], that Court went on to rule and dispose of the issue on the merits of the claim (Ex. IV at 9). However, that court later allowed the record to be supplemented and reaffirmed this prior determination (see order filed March 27, 1985, p. 2). Where the state appellate court does not rely on procedural bar and instead disposes of the issue on the merits, the cause and prejudice standard of Wainwright v. Sykes, 433 U. S. 72 (1977), is not applied, and the habeas court may likewise consider the merits of the claim. County Court of Ulster v. Allen, 442 U.S. 140, 147-154 (1979).

[T]he ultimate issue is the same--whether the state has obtained the [statement] in a manner that comports with Due Process . . . ." 106 S.Ct. at 450 (citations omitted).

Voluntariness means that the statement was a product of a rational intellect and a free will. Blackburn v. Alabama, 361 U.S. 199 (1960). The determination of voluntariness of a statement involves the "totality of the circumstances" test in which the court must consider all the circumstances including the past history, education, physical condition and circumstances of the accused at the time the statement was given. Mincy v. Arizona, 437 U.S. 385 (1978). This constitutional requirement is not altered by the fact that the statements here were intended to be exculpatory. They were utilized by the state against the petitioner in its case in chief and involve him in the incident. They entail admissions that he was at the shooting (Tr. 539); that his car was at the scene (Tr. 540); that he threw the gun and a bag of cocaine up on the bank (Tr. 646); and a description of the gun (Tr. 539) and its location (Tr. 539, 600, 605). The same test of voluntariness to which a confession would be subjected must be applied. Escobedo v. Illinois, 378 U.S. 478, 484, 84 S.Ct. 1758, 1761, 12 L.Ed.2d 977 (1965)(defendant's "exculpatory" statement when confronted with another suspect, that "I didn't shoot Manuel, you did it" which led to his conviction for murder deemed constitutionally inadmissible); Kerrigan v. Scafati, 364 F.2d 759, 763 (1st Cir. 1966); see also Richardson v. Nelson, 444 F.2d 519, 520 & n.4 (9th Cir. 1971)(appropriate to examine voluntariness of "exculpatory" statements used for impeachment purposes, which preceded the exculpatory statements since they are part of the totality of circumstances).

The record shows that the petitioner was arrested several miles from the scene of the shooting. He was found lying amidst the broken glass and debris of a

doorway of a trailer in an adjoining county (Tr. 500, 533). He had been shot 5 times, once in the head, twice in the chest, once in the groin and once in his lower leg. Officer Hixson handcuffed him and read him the Miranda warnings. Clearly the initial questioning began after he was "in custody" within the meaning of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). As more officers arrived he was carried out onto the ground where the questioning continued. He was surrounded by the officers, some of whom were pointing their weapons at him (Tr. 443). The questioning continued during the ambulance ride to the hospital. The interrogating officer testified at trial he was afraid petitioner would die. Officer Hixson also took a statement from petitioner at the hospital four days later.[2]

While voluntariness need only be shown by a preponderance of the evidence, Lego v. Twomey, 404 U.S. 477 (1972), the procedure for determining voluntariness requires that the trial court first make a determination as to whether the prosecution has demonstrated the voluntariness of the statement and the defendant has a right to a hearing outside the presence of the jury on this preliminary fact determination. Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). Cf. Pinto v. Pierce, 389 U.S. 31, 88 S.Ct. 192, 19 L.Ed.2d 31 (1967).[3] See also, United States v. Carignan,

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[2]The existence of the earlier statements "is of course vitally relevant to the voluntariness of petitioner's later statements." Beecher v. Alabama, 389 U.S. 35, 36, n.2, 88 S.Ct. 189, 190, n.2, 19 L.Ed.2d 35 (1967) per curiam (citations omitted).

[3]In Pinto the Supreme Court upheld a conviction where defense counsel waived objection to the trial

342 U.S. 36, 38, 72 S.Ct. 97, 98, 96 L.Ed. 48 (1951)(defendant who challenges voluntariness of a confession should be given an opportunity to testify as to the facts surrounding his confession outside the presence of the jury); cf. 18 U.S.C. § 3501(a). This determination of voluntariness must be apparent in the record and, where the trial court fails to make a specific determination of voluntariness, the error cannot be held harmless. Mincey v. Arizona, 437 U.S. 385, 398 (1978).

It is the opinion of the undersigned that the truncated "suppression hearing" held in this case does not meet constitutional standards. No testimony was taken and it is unclear from the record whether the defendant was even present. The "suppression hearing" merely consisted of the respective attorneys' argument of the petitioner's motion to suppress the statements as involuntary. At the conclusion of the arguments, the trial court overruled defendant's motion, without making any express findings. (Ex. I, Vol. 16, pp. 25-33). The state's evidence on the voluntariness of the statements was taken piecemeal during the course of the trial, in open court and in the jury's presence, as the officers testified over the petitioner's objections. No jury-out hearing was given at trial.

In Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964), the Supreme Court clearly stated that "the procedures used in the trial court to arrive at its conclusion on the coercion issue . . . must . . . be fully adequate to insure a reliable and clear cut determination of the voluntariness of the confession, including the resolution of disputed facts upon which the voluntariness

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court's holding the voluntariness hearing in the presence of the jury. 389 U.S. at 32, 88 S.Ct. at 193.

issue may depend." Id. at 391, 84 S.Ct. at 1788.[4] See also Sims v. Georgia, 385 U.S. 538, 87 S.Ct. 639, 17 L.Ed.2d 593 (1967)(due process requirements of Jackson mandate that a jury is not to hear a confession unless and until the trial judge has determined that it was freely and voluntarily given . . . [and] his conclusion that the confession is voluntary must appear from the record with unmistakable clarity). See also Parker v. Sigler, 413 F.2d 459, 462 (8th Cir. 1969)(trial court's overruling of objection to admission of confession insufficient to constitute a finding of voluntariness), rev'd on other grounds, 396 U.S. 482, 483, 90 S.Ct. 667, 24 L.Ed.2d 672 (1970).[5]

In Lufkins v. Solem, 716 F.2d 532, 539 (8th Cir. 1983), cert. denied, _____ U.S. _____, 104 S.Ct. 2667, 81 L.Ed.2d 372 (1984), the Eighth Circuit concluded that where incriminating statements were admitted into evidence upon the officer's testimony in the presence of

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[4]It is also unclear from this record whether the state trial court found the law or the facts adversely to petitioner's contention, as it cannot be determined whether the state court denied relief because he disbelieved the petitioner's claims of coercion or denied relief because of the application of an incorrect legal standard, i.e., that the voluntariness standard did not apply to these statements intended to be exculpatory. See Townsend v. Sain, 372 U.S. 293, 314, 83 S.Ct. 745, 758, 9 L.Ed.2d 770 (1963).

[5]In Watkins v. Sowders, 449 U.S. 341, 346, 101 S.Ct. 654, 657, 66 L.Ed.2d 549 (1980), the Supreme Court implied but did not expressly decide that Jackson v. Denno established a per se due process right to a hearing outside the presence of the jury whenever the question of voluntariness of a confession is raised.

the jury, as to their voluntariness, before the defendant could test the accuracy and reliability of this testimony by cross-examination or by presenting rebuttal evidence, such procedures were neither fair nor adequate and were incapable of ensuring a fair and reliable determination of voluntariness. Nor were such constitutionally defective procedures harmless. As that Court explained,

> [T]he State contends that any procedural error here was harmless because the purported "airtight" testimony of [the officers] clearly established the [defendant's] statement was voluntarily given. We disagree. The officers' testimony, no matter how seemingly airtight, could not have supported a reliable determination of voluntariness until that testimony was first tested by [defendant's] cross-examination and rebuttal evidence. Providing a defendant with a meaningful opportunity to challenge the state's testimony on voluntariness is not an extravagant, procedural formality to be cast aside when convenient; it is fundamental to a fair and reliable determination of voluntariness and hence firmly rooted in the due process clause of the fourteenth amendment.

Where a habeas applicant has not been given an adequate hearing upon the voluntariness issue, the proper remedy is to remand the case back to the state in order that the state court may "provide [the defendant] with that which he has not yet had and to which he is constitutionally entitled--an adequate evidentiary hearing productive of reliable results concerning the voluntariness of his confession . . . ." Jackson, 378 U.S. at 397, 84 S.Ct. at 1790. The outcome of such an evidentiary hearing will determine whether a new trial is required.

Id. The other issues raised in the petition will be held in abeyance pending the hearing.

It is accordingly the recommendation of the undersigned that the State of Tennessee be required to afford the petitioner an evidentiary hearing on the issue of the voluntariness of his oral statements, or a new trial. 378 U.S. at 396, 84 S.Ct. at 1794.[6]

Respectfully submitted,

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Robert P. Murrian
UNITED STATES MAGISTRATE

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[6]Any objections to this Report and Recommendation must be filed and served within ten (10) days after service of a copy of this recommended disposition on the objecting party. Such objections must conform to the requirements of Rule 72(b), Federal Rules of Civil Procedure. Failure to file objections within the time specified waives the right to appeal the District Court's order. Thomas v. Arn, _____ U.S. _____, 106 S.Ct. 466 (1985).

IN THE CRIMINAL COURT FOR
ROANE COUNTY, TENNESSEE

STATE OF TENNESSEE

VS. NO: 7779

FRANK ANDREW McCALL

ORDER

This cause came on to be heard on the 9th and 10th day of March, 1987 upon the Order of the Federal District Court entered October 15, 1986, which required that a hearing be held in this Court concerning voluntariness of oral exculpatory statements made by Defendant, upon the presence of Defendant in open Court with his retained counsel Boone Dougherty, upon the testimony of witnesses, arguments and statements of counsel and upon the entire record of this cause, from all of which the Court is of the opinion and so finds the following facts and law:

1. The Court has found the totality of the circumstances test of voluntariness of the oral statements to be applicable--Clewis v. Texas, 386 U.S. 707, 708, 87 S.Ct. 1338, L.Ed.2d 423 (1967).

2. The Court has found the standard of proof to be a "preponderance of the evidence" standard. Lego v. Twomey, 404 U.S. 477, 192 S.Ct. 619, 30 L.Ed.2d 618, 1972. Colorado v. Connelly, 107 S.Ct. 515 (1986).

3. The Court finds that coercive police activity is a necessary predicate in the finding that a confession of a

defendant is not "voluntary" within the meaning of the due process clause of the Fourteenth Amendment.

4. The Court finds no reason to require more in the way of a "voluntariness" inquiry in the Miranda waiver context than in the Fourteenth Amendment confession or statement context.

5. The Court finds that the voluntariness of a waiver of the Fifth Amendment Privilege (i.e., Miranda Waiver) has always depended on the absence of police overreaching, not on "free choice" in any broader sense of the word--Moran v. Burbine 475 U.S. _____, 106 S.Ct. at _____, and Colorado v. Connelly 107 S.Ct. 515 (1986).

6. The Court finds the following facts in this matter:

A. That Frank McCall was stopped as he drove his automobile in a southerly direction on Highway 58 about six (6) miles south of Kingston, Tennessee at about 10:30 P. M. on the 15th day of March, 1983, by Officer Dennis Armes, a Roane County Deputy Sheriff.

B. That during this encounter Officer Armes fired five shots from his weapon striking Frank McCall in the left leg, groin, chest (2 flesh wounds) and in the side of his head and that Officer Armes was killed by one shot to the chest area from a .375 caliber pistol later found at the scene.

C. That Frank McCall got into his automobile and continued down Highway 58 in a southerly direction to the store/residence of Sarah Carter in Meigs County, Tennessee, and walked around to the back of this structure. That the time period was approximately 10:30-11:00 P.M., the road was two lane, hilly in spots and curvy throughout and the distance travelled was approximately

6-10 miles and asked for permission to come in to use the telephone and was denied entrance, but offered help, Frank McCall returned to his automobile and drove several more miles to the mobile home residence of 76 year old Joseph Gunter in McMinn County, Tennessee, and stopped in his driveway.

D. That at the residence of Mr. Gunter, Frank McCall got out of his automobile and asked for help, then asked if Mr. Gunter had a telephone. Frank McCall then asked Mr. Gunter to go back outside to turn off his car, which he did. Mr. Gunter wanted to call the "law", but Mr. McCall wanted to call friend(s) to come get him. That Mr. McCall made some calls and Mr. Gunter tried to make one or more on his behalf. When Mr. Gunter was unable to reach the desired person(s) by phone, Frank McCall demanded that Mr. Gunter drive him to the City of Etowah, Tennessee and picked up a pair of scissors and threatened to stab Mr. Gunter in the stomach if he refused. Mr. Gunter tried without success to grab the scissors out of Frank McCall's hand, but Mr. McCall would not turn loose. Mr. Gunter moved back quickly and pulled a gun out of his hip pocket and moved back up near Mr. McCall. Mr. McCall recognized that he had the weapon, stating, "Oh, you've got a gun, ain't you" or words to that effect. Mr. Gunter told Mr. McCall to put the scissors on the table, which he did, and then he fell on the floor.

Mr. Gunter went out to summon help from nearby residents, and getting no response he went back to his home, passing Frank McCall who was at this time lying on the ground outside his mobile home. Taking this opportunity to summon authorities by phone, Mr. Gunter went inside locking both the storm door and main door behind him. As he was dialing the police number he heard Mr. McCall breaking the lock on the storm door and Mr. McCall burst through the small window in the

upper portion of the main door and reached over to where his phone hung on the wall and hung it up.

Soon Mr. Gunter's son arrived and asked Mr. McCall what was going on and he responded, "I've been shot and robbed", or words to that effect. At Mr. McCall's request, Harold Gunter made a phone call to a woman in Etowah who had him to ask Mr. McCall his name and Mr. McCall then said his name to them for the first time. Mr. McCall took the phone and talked to the person on the other end in a rather rough manner. The phone went out of order and Mr. McCall wanted Harold Gunter to go over to the store and make further calls. Harold Gunter summoned police and ambulance personnel. Mr. McCall asked Joseph Gunter to close the door, which was refused, and asked for assistance to the couch, which was refused by Mr. Gunter who still held his pistol on Mr. McCall. Police arrived within minutes and the Gunters went outside and allowed police to handle it from there.

E. That officers from several police agencies arrived on the scene in short order and Steve Hixson, who was at that time a Roane County Sheriff's Deputy, advised Mr. McCall of his "Miranda" rights from a card he carried in his pocket and which Mr. McCall said he understood, and then caused Mr. McCall to be moved from the glass strewn doorway out into the open area in front of the steps to await arrival of the ambulance.

Several questions were asked to Frank McCall while awaiting arrival of the ambulance to which he responded in a manner which indicates that he understood his surroundings and the questions which were being asked of him and which, by and large, tend to be exculpatory in nature and which tend to cast blame on a person named Dotson.

That Frank McCall was transported to the nearest hospital without delay, where R. L. McKenzie, Meigs County Sheriff, with the aid of Deputy Richards, a McMinn County Deputy, read Frank McCall his rights from a standard form and after seeking and obtaining permission of the attending doctor, asked questions of Mr. McCall which were similar in nature to those asked of him by officers at Mr. Gunter's residence. Mr. McCall was wounded at the time, but was alert, and oriented as to time, place and circumstances.

That Frank McCall had ingested cocaine, a "quaalude" and a beer just prior to the events leading to his being shot and admitted on cross examination his knowledge that these substances had the effect on the human body of being pain deadening in nature.

Upon being transferred to University of Tennessee Hospital, Mr. McCall was admitted and some days later was in his room after therapy when he engaged Officer Steve Hixson in a conversation. Officer Hixson was assigned to sit outside his room in the hallway and guard the room and Mr. McCall. During this conversation Frank McCall recounted the events of the evening of the shooting, which were substantially the same as his statements to officers at Mr. Gunter's residence. The Court finds these statements were voluntarily made and that Mr. McCall initiated the conversation wherein these statements were made.

F. This Court finds that Frank McCall was a 35 year old, well developed male who has a history of attending Northwestern Oklahoma College and Southwestern Missouri College, both on football scholarships. He attended the University of Tennessee at Knoxville and received a degree in education. He taught school for a year. He attended graduate school in psychology at California Institute of Integral Studies.

From all of the testimony and the record of the case, this Court finds that Frank McCall was wounded in the leg, groin, chest and head, but that it is apparent he knew his circumstances and was capable of exercising a rational intellect and a free will. Mr. McCall drove his automobile several miles on a two lane, curvy, rural road thereby placing distance between himself and the scene of the shooting. He did not collide with any other motorist nor any roadside fence, ditch, utility pole, etc. He left the home of Sarah Carter when she would not let him in, but had announced she would call help for him. It is clear that his purpose was to get help from friends in Etowah and avoid police contact. Mr. McCall drove several more miles to Mr. Gunter's residence in an adjoining county and his conduct with Mr. Gunter causes this Court to conclude that he was exercising his rational intellect and his free will. His cognitive abilities were still not significantly impaired. He was not abused by authorities who read his Miranda warnings from a card and to which Mr. McCall said he understood. The Court finds no police overreaching under the circumstances of this case. Frank McCall is a well educated man with a history of being an athlete, who apparently comes from a middle-class family background.

It is therefore ORDERED that the State of Tennessee has met its standard of proving the statements made by Mr. McCall were voluntary by a preponderance of the evidence, under the totality of the circumstances in this case.

Entered this 5th day of May, 1987.

E. EUGENE EBLEN
CRIMINAL COURT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

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| FRANK ANDREW McCALL, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | No. Civ. 3-86-215 |
| | ) | |
| MICHAEL DUTTON, et al., | ) | |
| | ) | |
| Defendants. | | |

MEMORANDUM

This matter was referred to the undersigned United States Magistrate pursuant to a standing order of this Court, 28 U.S.C. § 636(b), and Rules 1 and 10 of Rules Governing § 2254 Cases in the United States District Courts, for a report and recommendation regarding disposition by the District Court of the petition for a federal writ of habeas corpus, 28 U.S.C. § 2254, filed by Frank Andrew McCall. Petitioner was convicted of first degree murder and possession of Cocaine with intent to resell on August 30, 1983, in the Criminal Court for Roane County, Tennessee. Petitioner's punishment for the murder conviction was fixed at life imprisonment. He was fined $15,000 on the drug conviction and sentenced to an additional eight years imprisonment to run consecutively to the life sentence. The petitioner challenges his confinement by the State of Tennessee based on the aforementioned convictions.

Petitioner appealed his convictions to the Tennessee Court of Criminal Appeals which affirmed the judgment of the trial court on February 1, 1985. The petitioner then filed a motion to supplement the record and a petition to rehear, which was granted on March 27, 1985, limited to the issue of the admission of certain evidence found in a search of the petitioner's automobile. After careful consideration of petitioner's Fourth Amendment claims, the Court of Criminal Appeals affirmed the judgment of the trial court. Petitioner subsequently timely filed an application for permission to appeal in the Supreme Court of Tennessee, which was denied in an order issued September 30, 1985.

The petition under consideration asserts six grounds for relief, all of which have been exhausted in state court and are based on due process:

(1) Impermissible voir dire of prospective jurors resulting in a "death qualified" jury;[1]

(2) Failure to grant a change of venue after extensive pretrial publicity;

(3) Admission into evidence of petitioner's oral statements which were involuntary;

(4) Admission into evidence of testimony of Trooper Brooks concerning statements made by petitioner which were not disclosed in requested discovery;

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[1]Petitioner's Memorandum in Response to the Respondent's Supplemental Response concedes that this issue was resolved adverse to the petitioner in Lockhart v. McCree, 106 S.Ct. 1758 (1986).

(5) Admission into evidence of photographs of the deceased; and

(6) Admission into evidence of results of atomic absorption tests.

The petitioner also asserts that he did not receive a full, fair, and adequate hearing in state court on his Fourth Amendment search issue.

This Court directed, in an Order filed October 15, 1986, that the petitioner be given a hearing on the issue of the voluntariness of his confession by the Criminal Court for Roane County, after finding that the "suppression hearing" already held had not met constitutional standards [Doc. 11]. Petitioner's remaining claims were held in abeyance until such hearing could be held. The petitioner was given a hearing pursuant to this Court's Order on March 9 and 10, 1987. The petitioner's confession was found to have been voluntary by the Criminal Court of Roane County's Order of May 5, 1987, which Order was filed with this Court on June 16, 1987 [Doc. 13].

ADMISSION OF PETITIONER'S ORAL STATEMENTS

The petitioner asserts that he was denied due process of law due to the trial court's alleged error in admitting into evidence the statements petitioner made to officers at the scene of his arrest and at the hospital. Although these statements were not confessions per se, petitioner contends that they were used against the petitioner at trial, and thus, were admissions against interest and were materially adverse to his position. The state used petitioner's statements to place petitioner and his car at the scene of the crime, and thus, to involve petitioner in the incident in question. The constitutional requirement that statements be voluntary and the standards by which

voluntariness is determined are not altered by the fact that petitioner's statements were found by the state court to be exculpatory. See Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758, 1761 (1964)(defendant's exculpatory statement to another suspect that, "I didn't shoot Manuel, you did it," which led to defendant's murder conviction held constitutionally inadmissible); Kerrigan v. Scafati, 364 F.2d 759, 763 (1st Cir. 1966), cert. denied, 385 U.S. 953 (held that "although the petitioner's statements utilized in his trial were not a confession but were intended to be exculpatory, we apply the same test of voluntariness to which a confession would be subjected").

The petitioner asserts that the atmosphere of the questioning was coercive because at the time he was interrogated he was severely wounded, which resulted in a weakened physical and mental condition. Therefore, petitioner asserts that the statements he made at that time were made involuntarily.

The respondent argues that although the ultimate question of voluntariness is a legal question under the due process clause requiring the federal courts to consider it independently, the federal court should consider a state court's findings on the underlying factual issues to be conclusive if they are fairly supported by the record and if the court does not find one of the exceptions listed in 28 U.S.C. § 2254(d) to exist.

The standard for determining the voluntariness of a statement was established in Townsend v. Sain, 83 S.Ct. 745, 372 U.S. 293 (1963). After reviewing several of its own decisions, the United States Supreme Court adopted the following:

> If an individual's 'will was overborne' or if his confession was not 'the product of a rational

> intellect and a free will' his confession is inadmissible because coerced.

Townsend v. Sain, 83 S.Ct. at 754, citing Reck v. Pate, 81 S.Ct. 1541, 1546, 367 U.S. 433, 440 ("The question in each case is whether a defendant's will was overborne at the time he confessed"), and Blackburn v. Alabama, 80 S.Ct. 274, 280, 361 U.S. 199, 208 (1960)(confession should be the "product of a rational intellect and a free will"). The voluntariness of a statement or a confession must be determined after a careful evaluation of the "totality of circumstances." See Blackburn v. Alabama, 80 S.Ct. at 280. The Supreme Court stated in Culombe v. Connecticut, 81 S.Ct. 1860, 1878-79, 367 U.S. 568 (1961) that:

> It is impossible for this Court, in enforcing the Fourteenth Amendment, to attempt precisely to delimit, or to surround with specific, all-inclusive restrictions, the power of interrogation allowed to state law enforcement officers in obtaining confessions. No single litmus-paper test for constitutionally impermissible interrogation has been evolved: neither extensive cross questioning . . . ; nor undue delay in arraignment . . . ; nor failure to caution a prisoner . . . ; nor refusal to permit communication with friends and legal counsel at stages in the proceeding when the prisoner is still only a suspect. . . . Each of these factors, in company with all of the surrounding circumstances--the duration and conditions of detention (if the confessor has been detained), the manifest attitude of the police toward him, the physical and mental state, the diverse pressures which sap or sustain his powers of resistance and self-control--is relevant.

The respondent is correct in stating that the United States Supreme Court has established a three-step process for resolving issues of voluntariness. The first step is finding the historical facts--the events and occurrences surrounding the confession. This step is performed by the state, and the federal court is bound by those findings unless they are wholly without support in the record. See Culombe v. Connecticut, 81 S.Ct. at 1879. The second step involves a determination of the "psychological fact"--the defendant's mental state and how he reacted to the external facts. Id. at 1879. The third step involves the application of standards for judgment and legal concepts to the "psychological" fact. Id. at 1879. The last two steps are, according to the U.S. Supreme Court in Culombe, "inextricably interwoven." The federal court is not bound by the state court's conclusions of law, thus, the last two phases of the voluntariness analysis are not conclusive on the federal court. Cf. Miller v. Fenton, 106 S.Ct. 445, 450-51 (1985), cert. denied, 107 S.Ct. 585.

The Criminal Court of Roane County made specific findings in an evidentiary hearing conducted to determine the voluntariness of the petitioner's statements. Specifically, Judge E. Eugene Eblen found, inter alia, that the petitioner was stopped by Officer Dennis Armes, a Roane County deputy sheriff, at approximately 10:30 P.M. on March 15, 1983; that Officer Armes fired five shots from his weapon; that the petitioner was struck once in the left leg, once in the groin, twice in the chest (flesh wounds), and once in the side of his head; that the petitioner returned to his automobile and continued toward Meigs County, Tennessee, where he sought permission to use a telephone from Ms. Sarah Carter; that Ms. Carter denied the petitioner permission to enter but offered help; that petitioner returned to his automobile and continued toward McMinn County, Tennessee, to the home of

Joseph Gunter; and that petitioner asked Mr. Gunter for help and sought the use of a telephone. Judge Eblen also found that once the authorities were summoned, several police officers arrived on the scene; that Officer Steve Hixson read petitioner his "Miranda" rights; that Officer Hixson had petitioner moved from the glass strewn doorway of Mr. Gunter's mobile home to an open area outside to await the arrival of an ambulance; that several questions were asked of petitioner and that petitioner responded in a manner that indicated he understood his surroundings and the questions being asked of him; that petitioner was transported to the nearest hospital where R. L. McKenzie, Meigs County Sheriff and Deputy Richards, a McMinn County deputy, questioned the petitioner after obtaining the attending doctor's permission and reading petitioner his Miranda rights; and that although the petitioner was wounded, he was alert, and oriented as to time, place and circumstances.

The trial court failed to make any findings, however, on the number or demeanor of the officers present; whether any or all of those officers had their pistols or rifles drawn; or whether the petitioner was alternating from a conscious to an unconscious state prior to and/or during questioning.

The question of voluntariness must be decided on the peculiar facts of each case. See Culombe v. Connecticut, 81 S.Ct. at 1889. "[I]t is only by a close relevant comparison of situations that standards which are solid and effectively enforceable--not doctrinaire or abstract--can be evolved." Id. Therefore, the undersigned must compare the petitioner's case, incorporating the historical facts as found by the state trial court, to another case or cases involving similar historical facts. The case which most closely parallels the petitioner's case is that of Pea v. United States, 397 F.2d 627 (D.C. Cir. 1967). Pea involved a defendant with a

gunshot wound to the right temple. Mr. Pea was questioned by a detective after the detective received permission from the attending physician in the emergency room at approximately 10:53 P.M. During the interrogation the doctor, two nurses, and two other police officers were present in the room. The interrogation lasted approximately five minutes, during which time the defendant admitted shooting his wife and himself. The detective testified that Mr. Pea appeared to be coherent, had no trouble talking, and did not appear to be in pain. Mr. Pea was then transported to another hospital and arrived there between 11:30 and 11:45 P.M. The hospital record stated that Mr. Pea was conscious, coherent, and ambulatory; had no vision in his right eye, which was swollen, tender, and painful; and had a blood pressure of 130/80 and a pulse of 60. Another physician examined Mr. Pea at approximately 1:00 or 2:00 A.M. and found him to have a concussion and to be lethargic. According to the uncontradicted medical testimony of the examining physician, when one is in a state of lethargy, one does not care about anything and is indifferent to protect or not protect oneself. Additionally, the doctor's admitting notes stated: "Pt. conscious--alcohol odor.--Pt. can talk coherently [but not fluently]." See Pea v. United States, 397 F.2d at 633. The examining physician also testified that the defendant's blood pressure, pulse, and respiration were normal; that there was some bleeding; that both eyes were swollen and there were signs of a big hemorrhage in the right eye; that the bullet had destroyed the right optical nerve and become implanted in the skull; and that there was no brain damage. The Court found that, although the defendant appeared to be coherent, he was rendered "devoid of his normal will to protect himself and rendered indifferent to protect himself." Pea v. United States, 397 F.2d at 634. The Court held that

> [A] statement does not reflect his own free will or intellect if his statement is attributable in critical measure to the fact that his self-protective mechanism is negated or overridden by external force or fraud, a condition of insanity, [or] the compulsion of drugs.

Id.

The petitioner, at the time of the initial questioning, had been shot five times. There is no dispute that he was seriously wounded. Additionally, there was considerable evidence in the record that the petitioner had lost a large amount of blood (Tr. 127-128; 187-188; 216-226; 236; 272-273). The admitting notes of William L. Burkhart, M.D., state that the petitioner was in "marked distress secondary to his multiple gunshot wounds"; that he was "lethargic, but oriented and respond[ed] appropriately to pain"; that "the left orbital area shows marked hematoma with ecchymoses, with left eye swollen shut"; and that the exam was "consistent with either transection or bruising of the left optic nerve" [see Doc. 18, Vol. 5 of Transcript of Evidence]. During questioning the petitioner was handcuffed and lying on the ground. There is testimony in the record that the petitioner was passing out and coming to before and during the questioning (Tr. 125-126; 216-218). The record additionally reflects that at no point was there less than four officers on the scene, and at the time of the questioning outside Mr. Gunter's trailer there were anywhere from six to fourteen officers in the area (Tr. 36, 44, 114, 156-57, 282 and 311). There is much testimony that the scene was very hectic and that the officers present were angry and yelling questions at petitioner (Tr. 70, 114, 311-312). Additional testimony indicates that several officers had their guns, rifles, or shotguns drawn (Tr. 69-70; 117, 157, 277, 290-295). There is also evidence that petitioner had ingested

cocaine, a quaalude, and a beer just prior to his being shot.

The undersigned is of the opinion that the totality of the aforementioned circumstances led the petitioner to make statements involuntarily. It is hard to imagine a situation less conducive to the giving of a statement which is the "product of a rational intellect and a free will." The petitioner's physical condition (loss of blood due to five gunshot wounds with a serious wound to the head producing blindness in the left eye), his state of lethargy, and his physical surroundings (6-14 angry officers, some with guns, rifles or shotguns drawn) diminished the petitioner's ability to act of his own free will and "sapped his powers of resistance and self-control." See Culombe v. Connecticut, 81 S.Ct. at 1878-79. The petitioner's actions earlier in the evening which indicated that petitioner was attempting to protect himself are not a true indication of his physical and mental state at the time he was questioned. The petitioner continued to lose blood to the point that Mr. Gunter was afraid he might bleed to death (Tr. 218; 226), and had fallen to the ground at least twice while at Mr. Gunter's residence (Tr. 216-217). The fact that petitioner fell to the ground twice while at Mr. Gunter's mobile home and a final and third time by the time officers arrived on the scene indicates petitioner's weakened and deteriorating physical condition. Additionally, it is not enough that the petitioner may have had a cognitive understanding of what he had done or that his confession was reliable and trustworthy. It must be shown that his will was not overborne. See Pea v. U.S., 397 F.2d at 632.

The undersigned does not believe that the state proved by a preponderance of the evidence that petitioner's statements were made with the free will and intellect requisite under constitutional standards.

Therefore, for the foregoing reasons, the statements made by the petitioner at the scene of his arrest and/or during transit to the hospital are found to have been made involuntarily.

The respondents assert that the petitioner initiated a conversation with Officer Hixson at the University of Tennessee Hospital four days after his admission, while Officer Hixson was assigned to guard the petitioner's room. At this time the petitioner is said to have made the same or similar statements to Officer Hixson as the petitioner made the night of his arrest.

Officer Hixson testified, however, that the petitioner wanted to know if Officer Hixson was guarding the hall because petitioner was afraid someone might enter the hospital and attempt to harm petitioner or a member of his family (Tr. 79). Officer Hixson admits that he initiated the questions concerning the shooting incident himself and at no time that day did he read the petitioner his Miranda rights. There is no question that the petitioner was "in custody" and that when Mr. Hixson initiated conversation about the evening of the shooting, the petitioner was being "interrogated." See Miranda v. Arizona, 86 S.Ct. 1602, 384 U.S. 436 (1966), reh'g denied, 385 U.S. 890. If the petitioner had effectively waived his Miranda rights on the evening of his arrest, it is possible that he would not have to be "rewarned" four days later. Since there was no valid waiver of Miranda rights, however, it was incumbent upon Officer Hixson to readminister the Miranda warnings. Cf. Wyrick v. Fields, 103 S.Ct. 394, 397 (1982)(The suspect must know of his right to stop interrogation and if circumstances have changed since a previous waiver of the right, the suspect must be rewarned). See also C. McCormick, McCormick on Evidence, § 153 at 403 (1984).

Although the petitioner's statements are found to have been involuntarily made, the question remains whether the admission of those statements into evidence constituted harmless error.[2] The United States Supreme Court, while holding that a federal constitutional error can be held harmless, has not squarely addressed the question of whether the admission of an involuntary confession can be harmless error. See Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 827 n.8 (1967), reh'g denied 87 S.Ct. 1283. The Court of Appeals for the Sixth Circuit has held, however, that in their opinion harmless error could be applied to an involuntary confession if there is overwhelming evidence which demonstrates that the erroneously admitted statements were harmless beyond a reasonable doubt. See U.S. v. Murphy, 763 F.2d 202 (6th Cir. 1985), cert. denied, 106 S.Ct. 812, citing Milton v. Wainwright, 407 U.S. 371, 92 S.Ct. 2174 (1972).

Accordingly, the parties are directed to file briefs on the issue of whether the admission of petitioner's involuntary statements constituted harmless error beyond a reasonable doubt within 20 days of entry hereof. Unless a hearing is requested, this matter will be decided upon the briefs of counsel.

A report and recommendation will be filed after the harmless error issue is dealt with.

FILE:

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Robert P. Murrian
UNITED STATES MAGISTRATE

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[2]The Court may raise the issue of harmless error sua sponte. See Crick v. Smith, 650 F.2d 860, 870 (6th Cir. 1981), reh'g denied Sept. 10, 1981, cert. denied, 1025 S.Ct. 1281.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

| | | |
|---|---|---|
| FRANK ANDREW McCALL, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| v. | ) | No. Civ. 3-86-215 |
| | ) | |
| MICHAEL DUTTON, et al., | ) | |
| | ) | |
| Respondents. | ) | |

REPORT AND RECOMMENDATION

This matter was referred to the undersigned United States Magistrate pursuant to a standing order of this Court, 28 U.S.C. § 636(b), and Rules 1 and 10 of Rules Governing § 2254 Cases in the United States District Courts, for a report and recommendation regarding disposition by the District Court of the petition for a federal writ of habeas corpus, 28 U.S.C. § 2254, filed by Frank Andrew McCall. Petitioner was convicted of first degree murder and possession of Cocaine with intent to resell on August 30, 1983, in the Criminal Court for Roane County, Tennessee. Petitioner's punishment for the murder conviction was fixed at life imprisonment. He was fined $15,000 on the drug conviction and sentenced to an additional eight years imprisonment to run consecutively to the life sentence. The petitioner challenges his confinement by the State of Tennessee based on the aforementioned convictions.

Petitioner appealed his convictions to the Tennessee Court of Criminal Appeals which affirmed the judgment of the trial court on February 1, 1985. The petitioner then filed a motion to supplement the record and a petition to rehear, which was granted on March 27, 1985, limited to the admission of certain evidence found in a search of the petitioner's automobile. After careful consideration of petitioner's Fourth Amendment claims, the Court of Criminal Appeals affirmed the judgment of the trial court. Petitioner subsequently timely filed an application for permission to appeal in the Supreme Court of Tennessee, which was denied in an Order issued September 30, 1985.

The petition under consideration asserts six grounds for relief, all of which have been exhausted in state court and are based on due process. One of the six grounds petitioner asserts for relief is that it was constitutional error to admit into evidence petitioner's oral statements which were involuntary.

This Court directed, in an Order filed October 15, 1986, that the petitioner be given a hearing on the issue of the voluntariness of his statements by the Criminal Court for Roane County, after finding that the "suppression hearing" already held had not met constitutional standards [Doc. 11]. Petitioner's remaining claims were held in abeyance until such hearing could be held. The petitioner was given a hearing pursuant to this Court's Order on March 9 and 10, 1987. The petitioner's statements were found to have been voluntary by the Criminal Court of Roane County's Order of May 5, 1987, which Order was filed with this Court on June 16, 1987 [Doc. 13]. In an Order filed September 9, 1987, the undersigned found that the totality of the circumstances at the time petitioner was arrested and initially interrogated led the petitioner to make statements involuntarily [see Doc. 23].

Additionally, the undersigned found that statements made by the petitioner and recorded by Officer Hixson at the University of Tennessee Hospital were taken in violation of the petitioner's Miranda rights. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966), reh'g denied, 385 U.S. 890. The parties were directed to file briefs on the issue of whether the admission of petitioner's involuntary statements constituted harmless error beyond a reasonable doubt [Doc. 23]. No hearing having been requested, the undersigned decides this matter upon the record and briefs of counsel.

The respondent argues that the evidence challenged by the petitioner was placed before the jury by petitioner's own testimony; that the record indicates that the petitioner was struck with five rounds of gun fire, clearly from the deceased officer's weapon; that there was no physical evidence to corroborate the petitioner's testimony concerning the presence of the person named Steve Dotson, despite a search by the officers who arrived at the murder scene; that the TBI criminologist testified that the results of the atomic absorption test conducted on petitioner were consistent with petitioner having fired a weapon; that there was overwhelming evidence of petitioner's guilt; and that, therefore, the admission into evidence of the petitioner's involuntary statements did not contribute to his conviction [see Doc. 27].

The petitioner asserts that the harmless error rule is not applicable to the involuntary statements made in this case; that this is a circumstantial evidence case as there is no absolute direct evidence, and certainly no overwhelming evidence, that the petitioner shot the deceased officer; that the TBI criminologist testified that she could only conclude that the petitioner could have handled the weapon; that said criminologist testified that she could not form an opinion one way or the other as to whether the petitioner handled or fired the weapon; that

a bloodhound was brought to the area surrounding the murder scene; that said bloodhound picked up a scent that led to a barn approximately a mile and a half to two miles from the scene; that the involuntary statements made by the petitioner, as testified to by certain officers, may have been construed as admissions by the jury and/or emphasized inconsistencies between petitioner's involuntary statements and his testimony at trial; and that, therefore, the involuntary statements admitted into evidence effected or influenced the jury in their consideration of petitioner's testimony [see Doc. 28].

It is well settled that some constitutional errors, if found to be unimportant or insignificant in the setting of a particular case, may be deemed harmless and will not require the automatic reversal of a conviction. See Chapman v. California, 386 U.S. 18, 22, 87 S.Ct. 824, 827, reh'g denied, 87 S.Ct. 1283 (1967). Chapman held, however, that

> the question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.

and that the

> state must demonstrate beyond a reasonable doubt that [the erroneously admitted evidence] did not contribute to the petitioner's convictions.

Chapman v. California, 386 U.S. at 23, 26, 87 S.Ct. at 827, 829. See also Krzeminski v. Perini, 614 F.2d 121, 125 (6th Cir. 1980), cert. denied, 449 U.S. 866 (held that for errors of a constitutional dimension, the court must determine whether error was harmless beyond a reasonable doubt); Eberhardt v. Bordenkircher, 605 F.2d 275, 279 (6th cir. 1979)(held that ". . . harm is presumed to have flowed from constitutional error; the burden is on the state to

demonstrate conclusively to the contrary"). The United States Supreme Court has not squarely addressed the question of whether the admission of an involuntary confession can ever be deemed harmless error. See U.S. v. Murphy, 763 F.2d 202, 208, n.8 (6th Cir.), cert. denied, 106 S.Ct. 812 (1985). The United States Court of Appeals for the Sixth Circuit has held, however, that in their opinion, harmless error may be applied to an involuntary confession if there is overwhelming evidence of guilt which demonstrates that the erroneously admitted statements were harmless beyond a reasonable doubt. See U.S. v. Murphy, id., at 203, citing Milton v. Wainwright, 407 U.S. 371, 92 S.Ct. 2174 (1972). The United States Court of Appeals for the Fifth Circuit cautiously warned, however, that the courts must not be too quick to characterize an error of constitutional dimension as harmless:

> Chapman . . . may open a hatch for harmless constitutional error to appear, but its aperture is not so gargantuan that constitutional rights are minimized to infinitesimality. We must be confident that the scales of justice are not tilted. are not skewed. The Chapman harmless error rule was not intended to be a coverup for every prosecutorial error. It was really intended as a Band Aid for what is, under the circumstances, a minor, albeit constitutional, legal abrasion. The Constitution speaks in cosmic concepts of cosmic principles, and they are not to be grudgingly applied nor miniaturized. We must be careful lest the purgatory of the harmless error doctrine erode our sacred constitutional rights.

U.S. v. Hammond, 598 F.2d 1008, 1013-1014 (5th Cir. 1979), as cited in Eberhardt v. Bordenkircher, 605 F.2d at 278-79. Similarly, the Court of Appeals for the Sixth Circuit has held that

> Harmless error, in the context of a violation of a constitutional right of a defendant, is an extremely narrow standard, permitting the state to avoid the retrial of a defendant only when it can demonstrate beyond a reasonable doubt that the error did not contribute in any way to the conviction of the defendant (emphasis added).

Eberhardt v. Bordenkircher, 605 F.2d at 278.

The record of the petitioner's trial demonstrates that there was no search of the area surrounding the murder scene until approximately 2:00 a.m., approximately 3 hours after officers arrived at the scene (Tr. 224); that there was no helicopter search of said area until the day after Officer Armes was shot (Tr. 225); that there was one fingerprint on the murder weapon that could not be identified as the petitioner's (Tr. 246); that the TBI criminologist could not form a conclusive opinion as to whether the petitioner fired or merely handled the murder weapon (Tr. 824); and that there were no witnesses to the fatal shooting of Officer Dennis Armes. All of the evidence presented against the petitioner was circumstantial; thus, the credibility of the petitioner's testimony was critical to the jury's interpretation of the aforementioned evidence. The record further demonstrates that the petitioner's testimony at trial asserted that petitioner met a man who introduced himself as Steve Dotson 7 or 8 days prior to the death of Officer Armes (Tr. 938); that Mr. Dotson was introduced to the petitioner because petitioner was interested in buying a pound of cocaine (Tr. 938); that the petitioner did not see Mr. Dotson again until the night of the shooting (Tr. 939); that at 8:00 p.m. Mr. Dotson telephoned the petitioner, whereupon the two men agreed to meet at the Pizza Hut on Kingston Pike in West Knoxville (Tr. 940); that the petitioner did not carry a weapon and was not armed on the evening in question

(Tr. 942); that both Dotson and petitioner took friends to the Pizza Hut (Tr. 941, 943); that Dotson told petitioner that he kept his cocaine at a house in Roane County near the McMinn County line (Tr. 946); that petitioner and Mr. Dotson left the Pizza Hut together for Roane County (Tr. 946-948); that Dotson removed something from his friend's car before getting into petitioner's car (Tr. 947-948); that on the way to Roane County Dotson pulled a gun from under the passenger's seat of petitioner's car (Tr. 950); that on the way to Roane County, on Highway 58, blue lights appeared behind the petitioner's car and that petitioner pulled over to the side of the road (Tr. 951-52); that Dotson became nervous and picked up his gun (Tr. 951-52); that petitioner got out of his car to speak to the police officer, leaving the car door open (Tr. 952); that as petitioner reached for his wallet in his back pocket to show the officer identification, petitioner saw Dotson leaning over the driver's seat with the gun (Tr. 952); that as soon as petitioner turned back to face the officer the shooting started (Tr. 952); that petitioner was shot five times and fell to the ground (Tr. 953); that petitioner heard a second volley of shots after he had fallen to the ground (Tr. 954); that petitioner saw Dotson lay the gun down beside petitioner and felt Dotson remove his wallet (Tr. 954); that petitioner saw Dotson run up the road and cross into one of the surrounding fields (Tr. 954); that petitioner picked up the gun and tried to fire at Dotson, but the gun would not fire (Tr. 954); that the petitioner later crawled off the side of the road into a ditch and passed out (Tr. 954); that petitioner still had the weapon with him as he crawled into the ditch (Tr. 957); that petitioner understands the weapon was found on the bank, but that petitioner does not remember throwing the gun to that area (Tr. 957); that eventually the petitioner got back in his car and saw a baggie containing cocaine in the front seat (Tr. 957); and that he does not remember throwing said baggie out of the

window, but assumes that he did since that is where the baggie was found (Tr. 957).

The record demonstrates that the following testimony, contradictory to the petitioner's testimony, concerning statements involuntarily made by the petitioner was allowed into evidence (portions underlined are those that contradict the petitioner's testimony):

Testimony of Jesse Brooks, Exhibit I, Vol. VI, p. 449:

A: He was asked, "What happened?" He said that uh ---- "Who had shot Officer Armes?" And he said that another man, I ---- a Steve someone, had shot him. Asked where he was at, and he said he was laying in the bushes dead. We asked him which bushes, and he said, "Next to the patrol cat."

Testimony of Steve Hixson, Exhibit I, Vol. VII, p. 539:

A. I asked him if anyone was with him.

Q. What was his answer?

A. He said, "Dotson."

Q. What next?

A. I asked him where Dotson was; he stated, He's still up at the scene." Then I asked him where Dotson lived; he said, "I think he lives in Rhea County."

Testimony of Steve Hixson, id. at p. 552:

Q. Describe what he said.

A. He stated that, . . . the law had stopped him down on Highway 58; and after the shooting, he threw the gun and some coke up on the bank, got back in his car and drove off.

Testimony of Steve Hixson, id. at p. 553:

Q. What did he say about the pistol?

A. He said he threw it up on the bank.

Q. Who threw it up on the bank?

A. The defendant.

Q. Did he say anything about anything that he called "the coke"?

A. Yes, sir, he said he threw the gun and the coke up on the bank.

Q. Did he say where the person that was supposedly with him was, when he did that?

A. No, Sir. He said the --- there was a person --- he threw the coke and the gun; that somebody, someone, as they was running up a bank or some --- running from the car, up the bank.

Bryan Farmer Testimony, Exhibit I,
Vol. VIII, p. 645-646:

A. I asked him repeatedly, who was with him and what had happened to the gun. And he stated that this Dotson fellow was with him and he stated that the gun --- first of all, he stated that

the gun was thrown out upon the bank at the scene where Deputy Armes was killed; and later on, at the hospital, he changed his story to himself, he threw the gun out on down the highway from the scene.

Q. He threw it out of what?

A. Out in the ditch, out the window.

Q. Of the car[?]

A. Yes, sir.

Testimony of Bryan Farmer, id., at 654 (cross-examination):

Q. How many times did you ask him who was with him?

A. . . . I guess; four or five times.

Q. And he answered every time that it was somebody known to him as Steve Dotson was with him?

A. Yes, sir, in the ambulance, he did; then later, he changed it, at the hospital, to Scotty Dotson.

The various portions of the aforementioned testimony cast doubt on the credibility of the petitioner's testimony that he was with a man named Steve Dotson; that he doesn't remember what happened to the gun and the cocaine; that he tried to shoot Steve Dotson as he fled the scene but that the gun wouldn't fire; that Steve Dotson did flee the scene as opposed to being dead in the bushes; and that Steve Dotson shot Deputy Armes. Although the undersigned expresses no opinion on the

merits of the petitioner's defense, the undersigned is of the opinion that the respondent used the petitioner's own statements to emphasize contradictions in petitioner's testimony and "[strike] at the foundation of the only defense he presented." Bishop v. Rose, 701 F.2d 1150, 1157 (6th Cir. 1983). Bishop involved a case where the petitioner was instructed by his defense counsel to draft written statements of his activities between August 24 through August 31, the victim having been murdered on August 25. Before the statement was completed, the petitioner's cell was searched, the statement confiscated and copied, and subsequently used by the prosecution to impeach the petitioner at trial. The petitioner asserted that he had been denied due process and the right to effective assistance of counsel because a confidential communication between he and his attorney was used to impeach him. The District Court agreed that the petitioner's Sixth Amendment right had been denied him and in holding that the petitioner had clearly been prejudiced by such a denial, the United States Court of Appeals for the Sixth Circuit stated:

> [a]ll of the evidence of guilt was circumstantial. When Bishop elected to testify and sought to explain the circumstantial evidence his credibility became a critical issue.

Bishop v. Rose, 701 F.2d at 1157.

The petitioner in the above-styled case was in a predicament similar to the petitioner in Bishop, as all the evidence against petitioner was circumstantial making the petitioner's credibility critical to his defense. The use of petitioner's involuntary statements to create the inference that he had changed his story ever so slightly is as prejudicial, or more so, to the petitioner than the use of the confidential document in Bishop to impeach Mr. Bishop concerning a fact of little significance except to

create the inference that Mr. Bishop had changed his story from one previously given. Moreover, although the United States Court of Appeals for the Sixth Circuit held that it is possible for the admission into evidence of involuntarily made statements to be harmless error, the Court also noted that,

> most involuntary confession cases are muddied by conflicting evidence or evidence which, if uncontradicted, is at least subject to differing interpretations. [Here, however], the facts come to us . . . in almost clinical clarity [which allows us to determine that the error is harmless].

U.S. v. Murphy, 763 F.2d at 209. The facts in the present case, however, were not so clinically clear that the constitutional error of admitting the petitioner's statements was harmless. Rather, there was contradicting evidence subject to differing interpretations.

Accordingly, it is the opinion of the undersigned that the admission into evidence of the petitioner's involuntary statements was not harmless error as the undersigned finds that the state has not demonstrated beyond a reasonable doubt that the admission of said statements did not contribute in any way to the conviction of the petitioner. See Eberhardt v. Bordenkircher, 605 F.2d at 278.

It is therefore recommended that the petitioner's writ be GRANTED, and that petitioner be afforded a new

trial within a reasonable time and, failing that, that the writ issue on the challenged convictions.[1]

Respectfully submitted,

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Robert P. Murrian
UNITED STATES MAGISTRATE

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[1]Any objections to this Report and Recommendation must be filed with the Clerk of Court within ten (10) days of receipt of this notice. Failure to file objections within the specified time waives the right to appeal the District Court's order. See Thomas v. Arn, _____ U.S. _____, 106 S.Ct. 466 (1985).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

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| FRANK ANDREW McCALL, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| v. | ) | Civ. 3-86-215 |
| | ) | |
| MICHAEL DUTTON, et al., | ) | |
| | ) | |
| Respondents. | ) | |

## MEMORANDUM OPINION

This matter was referred to a United States Magistrate in this District pursuant to the standing order of this court, 28 U.S.C. § 636(b), and the Rules Governing § 2254 Cases in the United States District Courts, for a report and recommendation regarding disposition by this court of petitioner's petition for a federal writ of habeas corpus, 28 U.S.C. § 2254. On August 30, 1983, in the Criminal Court for Roane County, Tennessee, petitioner was convicted by a jury of first degree murder and possession of cocaine with intent to resell. He received a life sentence and an additional 8-year term of imprisonment to run consecutively with the life sentence. In his petition, petitioner challenges his confinement by the State of Tennessee under these convictions.

The petition under consideration asserts seven grounds for relief, all of which have been exhausted in the Tennessee state courts and are based on alleged

violations of the due process clause of the Fourteenth Amendment:

1. Impermissible voir dire of prospective jurors resulting in a "death qualified" jury;

2. Failure to grant a change of venue after extensive pretrial publicity;

3. Admission into evidence of petitioner's alleged involuntary oral statements;

4. Admission into evidence of testimony of Trooper Brooks regarding statements made by petitioner which were not disclosed in requested discovery;

5. Admission into evidence of photographs of the deceased allegedly intended to inflame the jury; and

6. Admission into evidence of results of atomic absorption tests.

7. Use at trial of certain items seized from petitioner's automobile.

In a report and recommendation submitted on September 10, 1986, the United States Magistrate recommended that, since the petitioner failed to receive an adequate hearing upon the voluntariness issue either at or prior to trial, the proper remedy was to remand the case to state court for the state court to afford petitioner an evidentiary hearing on the issue of voluntariness of his oral statements, or a new trial. [Court File #11]. This court adopted the Magistrate's report and recommendation and on October 15, 1986, it was ordered that the State of Tennessee hold an evidentiary hearing

on the issue of voluntariness of petitioner's oral statements or, alternatively, grant him a new trial. [Court File #12]. The State provided petitioner such a hearing on March 9 and 10, 1987. In an order entered on May 5, 1987, the Criminal Court of Roane County found petitioner's statements to have been voluntary. That order was filed with this court on June 16, 1987.

In a thorough and thoughtful memorandum filed on September 9, 1987, the United States Magistrate opined that certain of the statements of petitioner used against him at trial were involuntarily made. The Magistrate reserved submitting his report and recommendation until the parties were afforded an opportunity to file briefs on the issue of whether the admission of petitioner's involuntary statements constituted harmless error beyond a reasonable doubt. Following submission of those briefs, the Magistrate submitted his report and recommendation opining that the admission into evidence of petitioner's involuntary statements was not harmless error beyond a reasonable doubt. See Chapman v. California, 386 U.S. 18, rehearing denied, 87 S.Ct. 1283 (1967); United States v. Murphy, 763 F.2d 202 (6th Cir.), cert. denied, 106 S.Ct. 812 (1985). Accordingly, the Magistrate recommended that the petitioner's petition for the writ of habeas corpus pursuant to 28 U.S.C. § 2254 be granted, that petitioner be afforded a new trial within a reasonable time, and failing that, that the writ issue on the challenged convictions. The parties were notified of their right to object to the report and recommendation and respondents have timely filed their objections thereto.

This court has carefully reviewed the report and recommendation of the United States Magistrate on a de novo basis pursuant to 28 U.S.C. § 636(b)(1). For the reasons set out below, this court declines to adopt the Magistrate's report and recommendation. In addition,

the court has considered the other six grounds for relief raised by the petitioner and finds each ground to be without merit.

## I. Procedural History

During its July, 1983 term, the Roane County grand jury indicted the petitioner on charges of first degree murder of a police officer and the possession of a Schedule II controlled substance, cocaine, with intent to sell. Petitioner was tried from August 22 through 30, 1983 with the Honorable E. Eugene Eblen presiding. Prior to trial, petitioner's motion for a change of venue due to extensive local press coverage was denied. The jury found petitioner guilty on both counts and sentenced him to life imprisonment for first degree murder. The petitioner also received an eight-year sentence for possession of cocaine and he was fined $15,000.00. The trial court ordered petitioner's sentences to be served consecutively with each other and an outstanding Georgia sentence.

On September 29, 1983, petitioner filed a motion for new trial, and that motion was overruled on November 21, 1983. He filed notice of appeal on November 28, 1983. On February 1, 1985, the Tennessee Court of Criminal Appeals filed its opinion affirming the judgment of conviction. Petitioner filed a petition to rehear on February 11, 1985, and that petition was subsequently denied on July 19, 1985. Petitioner sought permission to appeal to the Tennessee Supreme Court, and on September 30, 1985, that court entered an order denying permission to appeal.

The petitioner filed the instant petition for the writ of habeas corpus on March 27, 1986. It is not disputed that

the petitioner has exhausted his state court remedies with respect to each of the seven grounds for relief he has raised.

## II. The Constitutionality of the Admission of Petitioner's Oral Statements

The petitioner asserts, and the Magistrate agreed, that petitioner was denied due process of law due to the trial court's alleged error in admitting into evidence certain statements petitioner made to officers at the scene of his arrest and later at the hospital. The State used these statements to place petitioner and his car at the scene of the crime. The statements were not confessions per se, but in large part were exculpatory statements intended to cast the blame on an alleged companion by the name of Steve Dotson. There is no question that at the time petitioner's statements were given he was severely wounded, suffering from five bullet wounds from the pistol of the deceased police officer. It was the petitioner's theory at trial that it was Dotson, his alleged companion, who killed the police officer.

### A. Standards Governing Voluntariness

The question of whether a particular statement is voluntary is seldom an easy one. The United States Supreme Court has held that, if an individual's "will was overborne" or if his confession was not "the product of a rational intellect and a free will," his confession is

inadmissible because coerced.[1] Townsend v. Sain, 372 U.S. 293, 307 (1963). The voluntariness of a particular statement or confession must be determined after a careful evaluation of the "totality of circumstances." Clewis v. Texas, 386 U.S. 707, 708 (1967). The standard of proof with respect to voluntariness has been defined by the Court to be a "preponderance of the evidence." Colorado v. Connelly, 107 S.Ct. 515 (1986); Lego v. Twomey, 404 U.S. 477 (1972).

Although the ultimate determination of voluntariness is a question of law, determination of the underlying historical facts must be performed by the state, and this court is bound by those findings unless they are wholly without support in the record. Culombe v. Connecticut, 367 U.S. 568, 603 (1961). Thus, the state court's findings of historical fact are entitled to a presumption of correctness. The Court has noted:

> In a case coming here from the highest court of a State in which review may be had, the first of these phases is definitely determined, normally, by that court. Determination of what happened requires assessments of the relative credibility of witnesses whose stories, in cases involving claims of coercion, are frequently, if indeed not almost invariably, contradictory. That ascertainment belongs to the trier of facts before whom those witnesses actually appear, subject to whatever

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[1]The constitutional requirement that statements be voluntary and the standards by which voluntariness is determined are not altered by the fact that those statements are exculpatory. See Escobedo v. Illinois, 378 U.S. 478 (1964); Kerrigan v. Scafati, 364 F.2d 759, 763 (1st Cir.), cert. denied, 385 U.S. 953 (1966).

> corrective powers the State's appellate process afford.
>
> This means that all testimonial conflict is settled by the judgment of the State courts. Where they have made explicit findings of fact, those findings conclude us and form the basis of our review - with the one caveat, necessarily, that we are not to be bound by findings wholly lacking support in evidence.

Culombe, 367 U.S. at 603.

Finally, while the suspect's mental condition is "surely relevant to an individual's susceptibility to police coercion," mere examination of the suspect's state of mind can never conclude the due process inquiry. Connelly, 107 S.Ct. at 521. Rather, the court has recently made it clear that "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the due process clause of the Fourteenth Amendment." Id., at 522. The court in Connelly observed that in the cases over a 50-year period in which it had found an involuntary confession, all had "contained a substantial element of coercive police conduct." Id., 107 S.Ct. at 520.

B. The State Court's Findings of Historical Fact

Because the determination of voluntariness turns largely on the historical facts found by the state trial court after the evidentiary hearing ordered by this court, it is the opinion of this court that these findings should

be set out in toto. Judge Eblen made the following findings:[2]

> A. That Frank McCall was stopped as he drove his automobile in a southerly direction on Highway 58 about six (6) miles south of Kingston, Tennessee, at about 10:30 p.m. on the 15th day of March, 1983, by Officer Dennis Armes, a Roane County Deputy Sheriff.
>
> B. That during this encounter, Officer Armes fired five shots from his weapon striking Frank McCall in the left lung, groin, chest (two flesh wounds) and in the side of his head, and that Officer Armes was killed by one shot to the chest area from a .375 caliber pistol leter [sic] found at the scene.
>
> C. That Frank McCall got into his automobile and continued down Highway 58 in a southerly direction to the store/residence of Sarah Carter in Meigs County, Tennessee, and walked around to the back of the structure. That the time period was approximately 10:30-11:00 p.m., the road was two lane, hilly in spots and curvy throughout and the distance traveled was approximately 6-10 miles and asked for permission to come in to use the telephone and was denied entrance, but offered help, Frank McCall returned to his automobile and drove several more miles to the mobile home residence of 76-year-old Joseph Gunter in McMinn County, Tennessee, and stopped in his driveway.

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[2]The court notes that these findings include not only findings of historical fact, but in a few instances conclusions on the ultimate issue of voluntariness.

D. That at the residence of Mr. Gunter, Frank McCall got out of his automobile and asked for help, then asked if Mr. Gunter had a telephone. Frank McCall then asked Mr. Gunter to go back outside to turn off his car, which he did. Mr. Gunter wanted to call the "law", but Mr. McCall wanted to call friend(s) to come get him. That Mr. McCall made some calls and Mr. Gunter tried to make one or more on his behalf. When Mr. Gunter was unable to reach the desired person(s) by phone, Frank McCall demanded that Mr. Gunter drive him to the City of Etowah, Tennessee and picked up a pair of scissors and threatened to stab Mr. Gunter in the stomach if he refused. Mr. Gunter tried without success to grab the scissors out of Frank McCall's hand, but Mr. McCall would not turn loose. Mr. Gunter moved back quickly and pulled a gun out of his hip pocket and moved back up near Mr. McCall. Mr. McCall recognized that he had the weapon, stating, "Oh, you've got a gun, ain't you," or words to that effect. Mr. Gunter told Mr. McCall to put the scissors on the table, which he did, and then he fell on the floor.

Mr. Gunter went out to summon help from nearby residents, and getting no response he went back to his home, passing Frank McCall who was at this time lying on the ground outside his mobile home. Taking this opportunity to summon authorities by phone, Mr. Gunter went inside locking both the storm door and main door behind him. As he was dialing the police number, he heard Mr. McCall break the lock on the storm door and Mr. McCall burst through the storm window in the upper portion of the main door and reached over to where his phone hung on the wall and hung it up.

Soon Mr. Gunter's son arrived and asked Mr. McCall what was going on and he responded, "I've been shot and robbed," or words to that effect. At Mr. McCall's request, Harold Gunter made a phone call to a woman in Etowah who had him to ask Mr. McCall his name, and Mr. McCall then said his name to them for the first time. Mr. McCall took the phone and talked to the person on the other end in a rather rough manner. The phone went out of order and Mr. McCall wanted Harold Gunter to go over to the store and make further calls. Harold Gunter summoned police and ambulance personnel. Mr. McCall asked Joseph Gunter to close the door, which he refused, and asked for assistance to the couch, which was refused by Mr. Gunter who still held his pistol on Mr. McCall. Police arrived within minutes and the Gunters went outside and allowed police to handle it from there.

E. That officers from several police agencies arrived on the scene in short order and Steve Hixson, who was at that time a Roane County Sheriff's deputy, advised Mr. McCall of his "Miranda" rights from a card he carried in his pocket and which Mr. McCall said he understood, and then caused Mr. McCall to be moved from the glass strewn doorway out into the open area in front of the steps to await arrival of the ambulance.

Several questions were asked to Frank McCall while awaiting arrival of the ambulance to which he responded in a manner which indicates that he understood his surroundings and the questions which were being asked of him and which, by in large, tend to be exculpatory in nature and which tend to cast blame on a person named Dotson.

That Frank McCall was transported to the nearest hospital without delay, where R. L. McKenzie, Meigs County Sheriff, with the aid of Deputy Richards, a McMinn County deputy, read Frank McCall his rights from a standard form and after seeking and obtaining permission of the attending doctor, asked questions of Mr. McCall which were similar in nature to those asked of him by officers at Mr. Gunter's residence. Mr. McCall was wounded at the time, but was alert, and oriented as to time, place and circumstances.

That Frank McCall had ingested cocaine, a "Quaalude" and a beer just prior to the events leading to his being shot and admitted on cross-examination his knowledge that these substances had the effect on the human body of being pain deadening in nature.

Upon being transferred to University of Tennessee Hospital, Mr. McCall was admitted and some days later was in his room after therapy when he engaged Officer Steven Hixson in conversation. Officer Hixson was assigned to sit outside his room in the hallway and guard the room and Mr. McCall. During this conversation, Frank McCall recounted the events of the evening of the shooting, which were substantially the same as his statements of officers at Mr. Gunter's residence. The court finds these statements were voluntarily made and that Mr. McCall initiated the conversation wherein these statements were made.

F. This court finds that Frank McCall has a 35-year-old, well developed male who has a history of attending Northwest Oklahoma College and Southwestern Missouri College, both on football scholarships. He attended the University of

Tennessee at Knoxville and received a degree in education. He taught school for a year. He attended graduate school in psychology at California Institute of Integral Studies.

From all of the testimony in the record of the case, this Court finds that Frank McCall was wounded in the leg, groin, chest and head, but that it is apparent he knew his circumstances and was capable of exercising a rational intellect and a free will. Mr. McCall drove his automobile several miles on a two lane, curvy, rural road thereby placing distance between himself and the scene of the shooting. He did not collide with any other motorist nor any roadside fence, ditch, utility pole, etc. He left the home of Sarah Carter when she would not let him in, but had announced she would call help for him. It is clear that his purpose was to get help from friends in Etowah and avoid police contact. Mr. McCall drove several more miles to Mr. Gunter's residence in an adjoining county and his conduct with Mr. Gunter causes this Court to conclude that he was exercising his rational intellect and his free will. His cognitive abilities were still not significantly impaired. He was not abused by authorities who read his Miranda warnings from a card and to which Mr. McCall said he understood. The Court finds no police overreaching under the circumstances of this case. Frank McCall is a well educated man with a history of being an athlete, who apparently comes from a middle-class family background.

Based on the findings of historical fact, Judge Eblen then concluded that the State of Tennessee had met its standard of proving the statements made by Mr.McCall were voluntary by a preponderance of the evidence under the totality of circumstances in this case.

As indicated previously, the findings of historical fact made by Judge Eblen are entitled to a presumption of correctness. According this presumption of correctness to Judge Eblen's findings of historical fact, this court finds that it is in agreement with Judge Eblen that the statements made by petitioner at the scene of his arrest were voluntary in a constitutional sense. The court finds that these factual findings demonstrate a lack of the "coercive police activity" that is a "necessary predicate to the finding that a confession is not 'voluntary' with the meaning of the due process clause of the Fourteenth Amendment." Connelly, 107 S.Ct. at 522. In addition, this court's review of the trial transcript and the hearing transcript reveals that those findings are supported by the record.

The evidence showed that Officer Hixson read petitioner his "Miranda" rights immediately upon arriving at the scene. The evidence supports a finding that although petitioner was seriously injured he was conscious and alert during the time that he was being interrogated. Tr. 166, 146, 140, 116. The petitioner was able to flee the scene of the shooting in his car, stop to call for help on two occasions, make a phone call and threaten an elderly man with a pair of scissors.

It is true that petitioner fell many times while he was fleeing. However, this does not mean that he was unconscious each time that he fell. The court notes that petitioner had a serious leg injury at the time.

It is petitioner's theory that while he was being interrogated at the scene of his arrest he was floating in and out of consciousness. There is evidence in the record which would support such a finding of historical fact. There is also evidence in the record to support a finding that petitioner was conscious throughout this period and was simply at times closing his eyes. Tr. 116. Moreover,

it is noted that there was evidence that petitioner was still conscious when he was being transported from the scene of his arrest to the hospital, Tr. 140, that he was conscious when he arrived at the hospital in Sweetwater, Tr. 142, and that he was conscious when he was being taken from the Sweetwater emergency room to the University of Tennessee Hospital, Tr. 146. The fact that he was conscious after he was taken from the scene of his arrest is strong evidence that he was conscious at the scene.

Specifically with respect to "coercive police activity," see Connelly, 107 S.Ct. at 522, the evidence of overreaching on the part of the police appears to be that there were many officers present, that some were angry and yelling questions at petitioner, and that several officers had rifles or handguns drawn. There was conflicting evidence on the question of whether questions were "yelled" at petitioner. (Compare Tr. 70, 114, 311-12 with Tr. 81, 158). Testimony and photographs indicated that several officers were carrying rifles or carbines at the time of the interrogation. Testimony was conflicting but also indicated that some officers had drawn pistols at least at some point. However, there is no clear evidence in the record that any of these weapons were ever pointed at the petitioner. Certainly there was no evidence that the officers used these weapons in any way to force a "confession" out of the petitioner.

Upon this court's review of the evidence, it is clear that petitioner was in an injured and weakened state at the time of his arrest and interrogation. However, this court cannot find the "coercive police activity" that is a "necessary predicate" to a finding that petitioner's statements taken immediately after his arrest were not voluntary within the meaning of the due process clause.

With respect to the statement taken by Officer Hixson two days later at U.T. Hospital, it appears from the record that while the conversation was initiated by the petitioner, Officer Hixson initiated those portions of the conversation regarding the shooting two days earlier. Tr. 78. It is also clear that Officer Hixson failed to administer to petitioner a Miranda warning at that time. Tr. 78-9. Since there was no valid waiver of Miranda rights at that time, it was incumbent upon Officer Hixson to readminister the Miranda warnings. See Wyrick v. Fields, 103 S.Ct. 394, 397 (1982). Therefore, the court is of the opinion that it was error for the trial court to admit into evidence petitioner's statements to Officer Hixson at the U.T. Hospital. However, those statements were cumulative with respect to the statement that petitioner had already given on the night of the shooting. Considering the cumulative nature of the evidence and the fact that the conversation with Officer Hixson was exculpatory in nature, the court finds that any error caused by its admission was harmless. Chapman v. California, 386 U.S. 18, rehearing denied, 87 S.Ct. 1283 (1967).

## III. Impermissible Voir Dire

Also raised in petitioner's petition was the contention that impermissible voir dire of prospective jurors took place at his trial resulting in a "death qualified" jury. Petitioner in his memorandum in response to respondents' supplemental response conceded that this issue was resolved adverse to the petitioner in Lockhart v. McCree, 106 S.Ct. 1758 (1986).

## IV. Failure to Grant a Change of Venue

Petitioner contends that he was denied due process of law and did not receive a full, fair, and adequate hearing in the state trial court when it denied his motion for a change of venue. Petitioner argues that the deceased was a popular deputy sheriff for Roane County, the place of trial, while petitioner was from Knox County. At the hearing on the motion for change of venue, the trial judge commented that the case was the most publicized one he could remember. It is clear that the case received widespread publicity in Roane County and all of the jurors knew something about the case. Not surprisingly, newspaper articles published in Roane County demonstrated affection for the deceased and hostility for the petitioner.

Under Tennessee law, the decision of whether to grant a motion for change of venue lies within the discretion of the trial judge. Rippy v. State, 550 S.W.2d 636 (Tenn. 1977). The ultimate question, of course, is whether the petitioner received a fair trial in this case. He might show this by demonstrating that "the setting of the trial was inherently prejudicial or that the jury-selection process of which he complains permits an inference of actual prejudice." Murphy v. Florida, 421 U.S. 794, 803 (1974). While the record in the instant case does not contain the voir dire of the jury that actually took place, it is clear that the trial judge intended to go to great lengths to insure that a fair jury was chosen. See Tr. 19-21.

The petitioner relies on the wide-spread publicity that the case received in Roane County and certain negative comments about petitioner that appeared in a "letter to the editor" in one of the local newspapers. "[E]xtensive knowledge in the community of either the crimes or the

putative criminal is not sufficient by itself to render a trial constitutionally unfair." Dobbert v. Florida, 432 U.S. 282, 303 (1977). Unfairness cannot be presumed solely on the basis of extensive press coverage in the absence of a "trial atmosphere . . . utterly corrupted by press coverage." Id., at 303. The petitioner has come forward with no evidence to indicate that the trial atmosphere was "corrupted by press coverage" or that the trial took place in a "circus atmosphere." See Murphy, 421 U.S. at 799.

Under the circumstances, it cannot be said that petitioner's trial was fundamentally unfair. The court finds no constitutional error in the trial court's denial of petitioner's motion for a change of venue.

## V. The Admission into Evidence of the Testimony of Trooper Jesse Brooks

Petitioner contends that the trial judge erred in admitting certain testimony of Trooper Brooks because the trooper testified as to a statement made by the petitioner that had not been provided by the State in discovery pursuant to Tenn.R.Crim.P. 16(a)(1)(A). Tenn.R.Crim.P. 16(a)(1)(A) provides for the disclosure of the substance of any oral statement which the State intends to offer into evidence at the trial made by the defendant, whether before or after arrest, in response to interrogations by any person then known by the defendant to be a law enforcement officer.

The testimony objected to concerned the statement Officer Brooks overheard the petitioner make while he was being questioned by other officers. The trial judge permitted the following testimony by Officer Brooks:

Q. Officer Brooks, specifically, what did the defendant, Frank McCall, say in your presence, about the other person -

The Court: I overrule any objection to that.

Q. - who might have been involved in the death of Dennis Armes?

A. Ok, sir. He was asked, "What happened?" He said that uh - "Who had shot Officer Armes?" and he said that another man, I - a Steve someone, had shot him. Asked where he was at, and he said he was laying in the bushes, dead. We asked him which bushes, and he said, "next to the patrol car." I can't remember, there was other questions asked and answers given, but I really can't recall which ones was what.

Tr. 449-50.

The Tennessee Court of Criminal Appeals concluded that it was obvious from the record that defense counsel was entitled to disclosure of the above statement. The Tennessee Court of Criminal Appeals concluded that this error was harmless. Assuming that the admission of this evidence raises a question of constitutional magnitude, and the court is of the opinion that it does not, any such error is harmless. This testimony was cumulative to other testimony provided by other officers at the scene. See Tr. 539-40.

## VI. Photographs of the Deceased

Petitioner contends that he was denied due process and did not receive a full, fair and adequate hearing in

state court when the trial court, over objection, allowed admission of certain photographs of the deceased taken both at the scene of the alleged crime and during the autopsy examination. There is no question that the deceased was killed by a gunshot wound to the chest and that his death occurred no later than 14 seconds after the shot. The petitioner did not dispute the cause of death. After the officer was shot and killed, his body was struck accidentally by an automobile driven by a passing motorist. As a result, the deceased's body was mangled and mutilated.

Three of the contested photographs were in black and white and taken at the scene of the crime. Three of the photographs were in color and were taken at the autopsy examination. The Tennessee Court of Criminal Appeals found three pictures taken of the deceased lying in the roadway to be completely irrelevant to the issues in the case and to be gruesome, horrifying, and inflammatory. See Exh. IX at p.8. The Court of Appeals also observed that in its opinion the evidence pointed directly and affirmatively to defendant as the person responsible for the homicide and that in spite of the fact that the State sought the death penalty, the jury saw fit to sentence the defendant to life imprisonment. Thus, the court concluded that it was satisfied that the erroneous admission of the photographs did not affect the result of the trial.

This court has reviewed the trial record and is in agreement with the Tennessee Court of Criminal Appeals that the error of the trial court in admitting the inflammatory pictures were harmless. See Chapman, 386 U.S. 18. There was a substantial amount of evidence pointing to petitioner's guilt. No evidence was found at the scene of the shooting to corroborate even the existence of Steve Dotson. It is also noted that the jury

chose to sentence the petitioner to life imprisonment rather than the death penalty the State sought.

## VII. The Admission of the Results of the Atomic Absorption Test

Petitioner contends that he was denied due process of law when the trial court admitted into evidence testimony concerning an "atomic absorption test." The result of this test was introduced by Diane Konkoly, a criminologist for the Tennessee Bureau of Investigation Crime Lab. The test is intended to demonstrate when someone has recently discharged a firearm by measuring gunshot residue in the form of antimony, barium and lead deposited on the individual's hands. These levels were measured on the petitioner's hands with the use of swabs and sent to her in Nashville. She testified at trial that the test results with respect to the petitioner demonstrated that he "could have fired or handled a gun." She could not form an opinion as to which of the two he had done.

Petitioner points out that on cross-examination Ms. Konkoly stated that what constituted significant levels of the various elements varied with the opinion of the individual tester, and that there were no known standards for reaching opinions in the field and that her findings were purely her opinions. She also conceded that she did not test-fire the gun, nor ask anyone else to do so, to determine what level of the various elements would be deposited. Tr. 816-18.

The court observes that state court rulings on admissibility of evidence may not be challenged in federal habeas corpus proceedings merely because the rulings are erroneous - the rulings must violate some right guaranteed to the defendant by the Fourteenth

Amendment. Poole v. Perini, 659 F.2d 730 (6th Cir. 1981). The court also observes that Ms. Konkoly testified that in her opinion petitioner could have handled or fired the gun. Thus, her testimony was consistent with petitioner's theory of the case: petitioner admitted that he handled the gun when it was placed beside him by Steve Dotson. Therefore, any error in the admission of the test under state evidentiary rules would not have had an effect on the outcome. In any event, the court is of the opinion that the evidentiary ruling in question does not call into question any right guaranteed to the petitioner by the Constitution.

## VIII. The Evidence Seized from Petitioner's Trunk

Finally, the petitioner contends that his rights under the Fourth Amendment were denied when certain items were seized from his automobile and used as evidence at trial. He also contends that he did not receive a full, fair and adequate hearing in the state court on these issues. Petitioner, in a pretrial motion, challenged the admissibility of all evidence secured as a result of the search of his car following the arrest. He also made timely objections during trial when the items seized were admitted.

Where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted habeas corpus relief on the ground that evidence obtained in an unconstitutional search and seizure was introduced at his trial. Stone v. Powell, 428 U.S. 465 (1976). The petitioner argued his Fourth Amendment claims prior to trial and again raised objections to the introduction of the evidence at trial. The Tennessee Court of Criminal Appeals, in rehearing

petitioner's appeal, reconsidered the question of the admissibility of this evidence. The court is of the opinion that petitioner was afforded an opportunity for a full and fair litigation of his Fourth Amendment claims. Therefore, habeas corpus review of these Fourth Amendment claims is barred by Stone v. Powell.

## IX. Conclusion

Based on the foregoing, the report and recommendation of the United States Magistrate [Court File #29] is REJECTED and petitioner's petition for the writ of habeas corpus is DENIED.

**Order accordingly.**

James H. Jarvis,
UNITED STATES DISTRICT JUDGE